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WISCONSIN REPORTS

142

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

FEBRUARY 22 — MAY 24, 1910

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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JOSHUA ERIC DODGE
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JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES

Attorney General - - FRANK L. GILBERT

Clerk - - - CLARENCE KELLOGG

MEMORANDUM.

Mr. Justice TIMLIN took no part in the decision of the cases reported in this volume on pages 144 to 278 inclusive, except the case of *Coffeen v. Town of Preble* (page 183).

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CASES DETERMINED

AT THE

January Term, 1910.

BENZ and another, Appellants, vs. KREMER and another, Respondents.

February 1—February 22, 1910.

Injunction: Restraining enforcement of void criminal statute: Constitutional law: Police power: Public health: Regulation of bakeries.

1. As a general rule, equity will not enjoin enforcement of the criminal law; but where property rights are being destroyed or threatened with destruction by action under a void ordinance or law, courts of equity will take jurisdiction to prevent the injury or destruction in a proper case, where the injured person would have no other adequate remedy.
2. In an action to enjoin enforcement of a criminal statute alleged to be unconstitutional, if the only provision thereof which affects plaintiff injuriously can stand as a valid enactment independent of the other provisions, such other provisions, whether constitutional or not, are immaterial in the action.
3. A reasonable police regulation is not invalid because property rights are to some extent affected by it.
4. It is for the legislature to determine in what cases and upon what conditions the police power may be exercised, and its determination will be deemed correct by the courts unless it appears to be clearly wrong; and the courts will also consider the ostensible purpose of a police regulation as its actual purpose unless the contrary clearly appears.
5. A police regulation which in general promotes the public health will not be held unreasonable or unnecessary merely because individual cases do not require its enforcement.

6. Sec. 1636—63, Stats. (Laws of 1907, ch. 486), providing that "no new bakery or confectionery establishment shall be established or operated in a room the floor of which is more than five feet below the level of the street, sidewalk or adjacent ground," is in the interest of the public health and is a reasonable and valid exercise of the police power.

MARSHALL, J., dissents.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action was brought by one *Nakielski,* owner, and one *Benz,* tenant, of a certain bakery building in the city of Milwaukee, against the defendant *Kremer,* as state bakery inspector, and *Beck,* commissioner of labor and industrial statistics, to restrain them from in any manner interfering with the plaintiffs in the use and enjoyment of the property in question and described in the complaint, and from interfering with the plaintiff *Benz* in conducting and carrying on a bakery business on the premises described, under a lease with the plaintiff *Nakielski,* and enjoining them from making complaint or arresting the plaintiff *Benz,* his agents or servants, for alleged violation of ch. 230, Laws of 1903, as amended by ch. 486 and ch. 530, Laws of 1907, and from prosecuting the action already commenced against said *Benz,* except to adjourn such prosecution from time to time until the termination of this action. The complaint is very voluminous and sets out in great detail many grounds upon which it is claimed that the law in question, above referred to and commonly known as the Bakery and Confectionery Law, is unconstitutional, therefore cannot be enforced. The complaint alleges that license was refused, after due application made therefor, on the ground that the bakery in question was established in a room the floor of which was more than five feet below the level of the street and sidewalk, and that this was the only objection to granting the license; that the bakery in question was constructed after the passage of the law prohibiting the floors in bakeries from being more than five feet below the level of the street; that arrests had been made on two occa-

sions before the commencement of this action for the sole reason that the floor in the plaintiff's bakery was more than five feet below the level of the street, and daily arrests were threatened thereafter if a change were not made so as to bring the floor into compliance with the law.

The defendants demurred to the complaint (1) for want of facts sufficient to constitute a cause of action; (2) for defect of parties plaintiff, in that the plaintiff *Nakielski* is improperly joined as plaintiff; and (3) that two separate and distinct causes of action have been improperly united. From an order of the circuit court sustaining the demurrer this appeal was taken.

Moritz Wittig, for the appellants.

For the respondents there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and oral argument by *Mr. Titus.*

Henry E. Foelske, appearing as *amicus curiæ.*

The following opinion was filed February 22, 1910:

KERWIN, J. While the complaint avers in great detail numerous grounds upon which it is claimed the law attacked is unconstitutional and void, the scope of investigation here is greatly narrowed by particular allegations. The only ground for refusal of license in this case, hence prosecution for carrying on the bakery business on the premises in question, as appears from the complaint, is that the plaintiff's bakery was constructed after passage of the law requiring the floor to be not more than five feet below the level of the street, and that the plaintiffs violated the law by constructing the bakery with the floor more than five feet below. No claim is made that the plaintiffs have in any other way violated the law, or that any prosecution is threatened or has been or will be maintained for any other cause.

It is a general rule that a court of equity will not take jurisdiction to enjoin enforcement of the criminal law. But there are some exceptions to this general rule, and it has been

held that, where property rights are being destroyed or threatened with destruction by action under a void ordinance or law, courts of equity will take jurisdiction to prevent the injury or destruction in a proper case. *Joseph Schlitz B. Co. v. Superior,* 117 Wis. 297, 93 N. W. 1120; *Milwaukee E. R. & L. Co. v. Bradley,* 108 Wis. 467, 84 N. W. 870; *Ex parte Young,* 209 U. S. 123, 28 Sup. Ct. 441; *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885. And in a proper case courts of equity will enjoin enforcement of an unconstitutional law. *Bonnett v. Vallier, supra; Ex parte Young, supra.* Courts of equity, however, will not take jurisdiction to enjoin the enforcement of an unconstitutional law at the suit of one who does not show himself injured by it. *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 442, 87 N. W. 561; *Strange v. Oconto L. Co.* 136 Wis. 516, 524, 117 N. W. 1023; *Wadhams Oil Co. v. Tracy,* 141 Wis. 150, 123 N. W. 785; *State ex rel. Rosenhein v. Frear,* 138 Wis. 173, 119 N. W. 894; *Jones v. Black,* 48 Ala. 540, 542; *Kansas City v. U. P. R. Co.* 59 Kan. 427, 53 Pac. 468; *Franklin Co. v. State ex rel. Patton,* 24 Fla. 55, 58, 3 South. 471; *McGinness v. Davis,* 7 Idaho, 665, 65 Pac. 364; *Gibbs v. Green,* 54 Miss. 592, 608. The foregoing cases very clearly illustrate the principle. In *Wadhams Oil Co. v. Tracy, supra,* the action was brought to enjoin execution of ch. 363, Laws of 1909, upon the ground that it was unconstitutional. At page 155 of 141 Wis. (123 N. W. 787) this court said:

"Doubtless when an enactment is wholly, or in greater part, unconstitutional, or in such part void that it is clear the person invoking equitable interference against persons assuming to have authority, as public officers, to enforce it, has no other way of adequately remedying the wrong, the doors of that ultimate resort should swing open freely. But it will not do to make of the courts, by equitable interference, a sort of superior upper house to consider and pass, in general, and particular as well, upon legislative enactments, as the court is requested to do in this case. If an enactment, in its general

scope and dominant particulars, is legitimate, as a general rule, equity jurisdiction for an attack upon the law should not be invokable to test mere minor features, but they should be left to their fate as cases arise specially involving them."

In *State ex rel. Rosenhein v. Frear,* 138 Wis. 173, 176, 119 N. W. 894, 895, it is said:

"Sound judicial policy precludes the court from considering the question of the constitutionality of a legislative act, unless a decision respecting its validity is essential to the determination of some controversy calling for judicial solution."

And in *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 442, 87 N. W. 561, and *Strange v. Oconto L. Co.* 136 Wis. 516, 524, 117 N. W. 1023, it is held that one cannot be heard to assail as unconstitutional a law which does not affect him injuriously. To the same effect are authorities in other states. In *Kansas City v. U. P. R. Co.* 59 Kan. 427, 53 Pac. 468, it is held that one cannot be heard to complain against a statute which discriminates between classes of persons in the imposition of burdens as being a denial of the equal protection of the laws, unless he belongs to one of the classes discriminated against. In *Gibbs v. Green,* 54 Miss. 592, 612, the doctrine is thus stated:

"Neither an executive nor a ministerial officer can be enjoined generally from putting a law in force. *Mississippi v. Johnson,* 4 Wall. 475. The complainant who seeks an injunction must be able to specify some particular act, the performance of which will damnify him, and it is such act alone that he can restrain. This court has no power to examine an act of the legislature generally and declare it unconstitutional. The limit of our authority in this respect is to disregard as in violation of the constitution any act or part of an act which stands in the way of the legal rights of a suitor before us; but a suitor who calls upon a court of chancery to arrest the performance of a duty imposed by the legislature upon a public officer must show conclusively, not only that the act about to be performed is unconstitutional, but also that it will inflict a direct injury upon him."

As appears from the allegations of the complaint, the only provision of the law attacked as unconstitutional which affects the plaintiffs injuriously is the following:

"Sec. 1636—63. After the passage of this act no new bakery or confectionery establishment shall be established or operated in a room the floor of which is more than five feet below the level of the street, sidewalk or adjacent ground. . . ." [Laws of 1907, ch. 486.]

If this provision can stand as a valid constitutional enactment independent of the others, then the others become wholly immaterial in this action, whether constitutional or not, under the authorities heretofore cited. That bakeries are within the field of regulation under the police power is unquestionable. This is not denied by counsel for appellants, as we understand their contention. But it is claimed that the law under consideration is an unreasonable invasion of property rights and falls within the condemnation of the rules of law as laid down in *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885, and other cases in this and other courts.

After all that has been said by this court in the numerous cases which have come before it in defining the police power and what is and what is not a reasonable exercise of it, it would seem unnecessary, if not useless, to attempt further discussion on the subject with a view of laying down general rules. Each case as it arises must turn upon its own particular facts under the rules of law laid down by the courts to the effect that when the legislation comes within the field of police regulation it will be sustained if within the bounds of reason, although to some extent property rights be affected. It would perhaps be difficult to imagine a police regulation which would not in some degree affect the property rights of persons coming within the field of the regulation. And the property of every person is held subject to the burden imposed by such reasonable regulation. *State v. Heinemann,* 80 Wis. 253, 49 N. W. 818; *State ex rel. Adams v. Burdge,* 95 Wis. 390, 398, 70 N. W. 347. All laws for the protection of

health, as well as for the quiet of the person and the security of property, fall within the general police power. *State ex rel. Adams v. Burdge, supra; State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500; *State v. Redmon,* 134 Wis. 89, 114 N. W. 137. The manifest purpose of the legislature in passing the five-foot-limit provision heretofore quoted was in the interest of health—a health regulation,—and as such we think it a valid exercise of the police power. In *State ex rel. Adams v. Burdge,* 95 Wis. 390, 398, 399, 70 N. W. 349, this court said:

"As the police power imposes restrictions and burdens upon the natural and private rights of individuals, it necessarily depends upon the law for its support; and, although of comprehensive and far-reaching character, it is subject to constitutional restrictions, and, in general, it is the province of the lawmaking power to determine in what cases or upon what conditions this power may be exercised."

And in *State v. Redmon,* 134 Wis. 89, 112, 114 N. W. 137, 142, the court said:

"The judgment of the legislature, of course, as to all of them is to be taken as correct, unless it appears to be clearly wrong, and also it is to be taken as true that its ostensible is its actual purpose, unless the contrary clearly appears."

That places where breadstuff for public consumption is prepared should be sanitary would not be questioned, nor that such places where sun and air are admitted would be much more so than basements so far below the surface of the ground as to practically, or in a large degree, exclude sunlight and an abundance of pure air, and thereby render the bakery less sanitary than if constructed not more than five feet below the level of the street. Obviously such a regulation could not be held unreasonable when its purpose and the effect of its observance would be to promote the production of wholesome food. But it is said that the plaintiff's bakery, though more than five feet below the surface of the ground, is still as sani-

tary as any other, because of the physical condition of the location; hence that there is no necessity for enforcing the law in the instant case. But individual cases cannot determine the necessity of a general law on the subject, nor indeed rule the question of classification. The question is whether, in general, the public health will be promoted by the rule, and not whether isolated cases do not need such a rule. If the rule be in the interest of the public health it must be general and all within the class controlled by it. *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 442, 87 N. W. 561; *State v. Evans,* 130 Wis. 381, 110 N. W. 241; *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, 120 N. W. 756; *Tenement House Dept. v. Moeschen,* 179 N. Y. 325, 72 N. E. 231. In dealing with the subject under consideration this court in *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 438, 439, 87 N. W. 564, said:

"The reasons for a given statute are for the legislature, if there are any which can fairly have weight. They are not for the courts. The latter have no control over the validity of a law, unless they can say with substantial certainty that no argument or consideration of public policy exists which could have weight with any reasonable and honest man. If any such argument or reason can be suggested, its weight or sufficiency is not debatable in the courts. The existence of legitimate and adequate reasons for any law should not lightly be denied. Human minds differ, and what may seem inadequate or irrelevant to one may seem cogent to another. One is not justified, therefore, in assuming that all who differ from him are unreasonable or are not acting in good faith. It is from such considerations as these that the courts have laid down for themselves the rule that only in a clear case—clear beyond reasonable doubt—will they venture to assert that a law is without reason to support either its purpose or the classifications it may make."

The five-foot clause of the law was considered by this court in the late case of *State ex rel. Ohlenforst v. Beck,* 139 Wis. 37, 119 N. W. 300, and, while the opinion is not direct authority upon the point involved here, it at least recognizes the

right of the legislature to impose such regulation. The five-foot provision must of course be a reasonable regulation in the light of the authorities cited. The appellants rely largely upon *State v. Redmon,* 134 Wis. 89, 114 N. W. 137; *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885; and *Lochner v. New York,* 198 U. S. 45, 25 Sup. Ct. 539. But these cases are not controlling here. In *Bonnett v. Vallier, supra,* the regulations imposed, as well as the penalty, were unreasonable, drastic, and destructive of property rights, as will be seen by an examination of the opinion. In *State v. Redmon, supra,* the act was an unreasonable invasion of property rights by attempting to give the occupant of a lower berth in a sleeping car control of the upper berth, thereby depriving the owner of the use and enjoyment of his property without compensation, not in the interest of the public, but of the occupant of the lower berth. And in *Lochner v. New York, supra,* the main question upon which the case turned was the right of liberty to contract respecting the hours of labor; that a law limiting the hours of labor could not be justified as a health law to safeguard the public health, or the health of the individual following the occupation of a baker.

Other provisions of the law are exhaustively discussed and claimed to be unconstitutional by counsel for appellants; but we need not consider them and do not decide whether valid or not because they do not injuriously affect the appellants here.

We are convinced that the provision for the violation of which prosecutions have been commenced and are threatened is a reasonable and valid exercise of the police power, and therefore the complaint states no cause of action.

By the Court.—The order appealed from is affirmed.

The following opinion was filed March 1, 1910:

MARSHALL, J. (*dissenting*). With general principles as I understand them to be stated in the opinion of the court, I do not dissent. Such principles have been so many times defi-

nitely proclaimed, that they need not be rediscussed. Probably when stated concisely, omitting discussion, where necessary to be invoked, danger of that confusion in which constitutional law has sometimes been involved again being created, would be minimized or avoided altogether, leaving only opportunity for divergence of views as to whether a given situation falls within or without them.

I understand the first principle at the threshold of this litigation is one of jurisdiction and is this: Where there is an attempt by an administrative officer to enforce an unconstitutional law, it is within the competency of a court of equity, at the suit of one who would, if the enforcement were permitted, be permanently injured and be without any other adequate remedy therefor, to enjoin such enforcement.

The next rule also appertains to jurisdiction in the broad sense of whether a court of equity ought to act in the particular class of situations represented though having the power to act. In that respect it has been declared as a rule of judicial policy, that where a legislative police regulation is legitimate as regards its dominant features and the infirmity appertains to a minor or inconsequential detail, the party claiming to be injured should, as a rule, be left to such remedy as he may have at law, that, of course, admitting of exceptions to fit extraordinary situations.

The next principle is this: If a law contains several features which are separable, one or more being constitutional and one or more not, and he who invokes equity jurisdiction to enjoin its enforcement only complains of threatened injury under the former, he cannot have relief, notwithstanding existence of the latter void provisions; but if the provision of which he complains would be valid by itself, but is merely compensatory to or is so united with the other provisions which are void that all constitute one inseparable enactment, then he may have the use of equity power, as sought here, to condemn the entirety.

The next principle is this: Every legislative regulation, ostensibly within the police power which goes beyond a reasonable regulation of any inherent right, is unconstitutional, not merely because it is unreasonable but because being so it violates some express provision of the fundamental law or its general purpose and spirit as to the security of life, liberty, and the pursuit of happiness.

Under those principles, if the law in question as to prohibiting bakeshops in basement stories of buildings where the floor is more than five feet below the level of the street, that being the only feature which affects appellants, is an unreasonable regulation of property rights and is a mere minor feature of the entirety, and is separable from the others, then one or more of such other features may be unconstitutional and yet equity should not give appellants relief. But if the particular feature is not minor in character or is a part of an inseparable entirety, then equitable interference may properly be invoked.

My brethren expressly, or inferentially, resolve the jurisdictional proposition as to matters of fact in favor of the respondents and so, necessarily, came to the conclusion from which I dissent.

To my mind, the proposition as to whether the prohibition of the use of basement stories of buildings is destructive instead of merely regulative of property rights, should be decided in favor of appellants. I cannot see any distinction between the situation here and the one in *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885.

My brethren concede that if the case in hand falls within the principles of the *Bonnett Case,* appellants should prevail, but fail to point out where it does not. It is said: "Each case as it arises must turn upon its own particular facts under the rules of law laid down by the courts," etc. Certainly it was not intended there to hold that principles change according to the shifting nature of facts, but only that whether any partic-

ular situation falls within or without the scope of certain principles depends upon its particular facts. Not that there can be any arbitrary location of a particular situation within or without the scope of the principles held to rule as to some other, but that its status in that regard must be determined logically. The court cannot properly say that one police regulation, made ostensibly in the interest of public health, unreasonably interferes with property rights and that another of the same general character, which interferes with property rights to the same extent, is reasonable, and so regulative instead of destructive.

In this case the court suggests that the law in question is a health regulation and makes such suggestion in a way to leave it inferable that the one in *Bonnett v. Vallier, supra,* was not, and for that reason that the decision in that case is not a precedent bearing on this one. The fact is the regulation in the *Bonnett Case* was a health regulation pure and simple. There is no way to distinguish the cases on that score. The one deprived the plaintiff of the use of a valuable part of his lot for building purposes, thereby taking away a part of his property, and likewise affected all other persons throughout the state similarly situated; the other deprives appellants from using a valuable part of their building for a legitimate business, thereby taking away a part of their property rights. In the one case it was not doubted but that the regulation, so called, was made in the interest of public health, and that, probably, public health would thereby be promoted, while here no greater claims are made. In the former it was not doubted but that public health of residents of tenement houses could be reasonably conserved without any such deprivation of property rights as was attempted, and here the situation is the same. So the court now in suggesting that the act in question is a health regulation, states, in my judgment, no distinction whatever between the two situations, but leaves it to be inferred, it seems, by one not familiar with the *Bonnett*

Case that the mere suggestion of the purpose of the law here is sufficient to differentiate the two cases.

The foregoing leaves nothing further that need be said to indicate a sufficient reason for holding that the feature of the law in question of which appellants complain, is void, and that the doors of equity should swing open to afford them protection against violation of their constitutional rights, since it must be obvious that such feature is a dominant, or at least a major, one as distinguished from a minor one.

I observe the court quotes at length with distinct affirmance. the rule recently proclaimed in *Wadhams Oil Co. v. Tracy,* 141 Wis. 150, 123 N. W. 785, as regards equity jurisdiction not being invokable to prevent a party from being injured by a mere void detail of a legislative police regulation, the enactment as to its general scope and dominant features being legitimate; but I do not find it decided expressly, if at all, whether the act before us is in those respects legitimate, or whether the particular provision is of a major or minor character, or whether the law is or is not in such greater part as to dominate the whole, unconstitutional. Many citations of authorities from cases are given but no express application thereof seems to be made to the case in hand.

True, following the rule that if a law in its general scope and dominant particulars is good, it is suggested that the regulation of bakeshops is a proper subject of police authority, which is readily conceded. But certainly, the meaning of the rule quoted from *Wadhams Oil Co. v. Tracy, supra,* is not that if the subject of a legislative police regulation is legitimate, that will satisfy the call for legitimacy of general scope and dominating particulars. Not only the "end must be legitimate" but "the means must be appropriate to that end." The term "general scope" seems to have been used by the court as if it appertained to the subject of regulation, instead of that, in connection with the manner and extent of interference. If that were the rule, in no case where the subject

is a proper one for police interference would equity take hold, though the manner and extent of the regulation might be such as to violate every fundamental principle of constitutional freedom.

Perhaps it may be inferred, where there is silence, from the citations and quotations that the court holds that the manner and extent of the regulation here, in the sense of the general scope of the enactment and its dominant features, are legitimate and that the particular feature is constitutional, or if not, that it is minor in character and separable from the balance of the act, and so that the court should not, in any event, afford a remedy in the manner of approach adopted, with which, as indicated, I should dissent.

The only thing I read as definitely decided is covered by the closing lines of the decision, to the effect that the particular regulation is a reasonable exercise of police authority and so equity should not interfere even if all the balance of the enactment is unconstitutional. It seems that could not well be unless such particular feature is separable from the entirety, so, logically, the court must be considered as holding that such particular feature is not inseparably connected with other major or dominant features which may possibly be void, and with that, as indicated, I dissent.

My brethren have no disposition to overrule anything decided in *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885, or cast any doubt upon it, but it seems that in the absence of any distinct decision, applying the authorities cited, as to whether the particular provision complained of is a dominant one, or a mere detail feature, and as to whether, if it be the latter, the law, otherwise, in the dominant or greater part thereof, as said in *Wadhams Oil Co. v. Tracy,* is unconstitutional, there is opportunity for bench and bar to get the idea that merely if the particular feature is a detail and does not by itself work unconstitutional injury to appellants they are remediless for the injury in fact.

It is probably not advisable for me at this time to go much further and demonstrate the, to my mind, obnoxious and controlling features of the law which would carry the particular one down as a part of an entirety, in any event. Generally speaking, it seems that the broad claim of appellants, which has not received consideration, has much, if not controlling, merit. The basic idea of the enactment, the one around which all others are clustered, is to declare, as a principle, that all bakeshops and employees therein and methods of manufacture, storage, and exposure of products for sale to consumers, shall be of the highest attainable standard having regard to the public health, and to delegate to a legislative agent the duty of determining that status, making regulations to that end, and passing upon each individual case as to whether falling below or not, with drastic penalties for infractions; a power that could be easily used in such a way as to drive many worthy manufacturers out of business unless they saw fit to secure immunity in some improper way. In other words, instead of the legislation making regulations to carry out a legislative policy, leaving it to the legislative agent to make such minor rules as are classible as administrative merely, and to perform wholly within the field of administrative duties, the policy is declared and the legislative, judicial, as well as administrative, duties are vested in the legislative agent. It seems to be very much like a law, so called, declaring in effect the constitutional policy that the "property of no person shall be taken" for public use without just compensation therefor, and delegating to a legislative agent the duty of making regulations to effectuate such policy and to administer the same, passing upon violations so as to leave to courts the duty, only, of determining whether his commands have been obeyed or not, as a condition precedent to visiting upon the heads of alleged offenders prescribed severe punishments. The whole law seems to be as indicated. If that be the real character of the act, it would not be

claimed that the framework could stand the constitutional test, or that the framework falling the mere details would not fall with it. That would condemn the particular feature, even if, by itself, it could be held legitimate to prohibit throughout the state, regardless of situations or conditions, the use of the basement story of any building for the ordinary business of running a bakeshop—as the learned attorney general very frankly confessed is the effect of such feature—notwithstanding it is, probably as a rule, entirely practicable to render such places reasonably suitable for such business.

GOODRICH, Appellant, vs. CRABTREE, Respondent.

February 1—February 22, 1910

Distress of animals doing damage: Notice: Replevin: Demand.

If a person distraining animals damage feasant knows their owner but fails to give him the notice prescribed in sec. 1631, Stats. (1898), within the time there specified, his seizure and detention of the animals becomes wrongful and no demand is necessary to enable the owner to maintain replevin.

APPEAL from a judgment of the circuit court for Sauk county: J. C. LUDWIG, Judge. *Reversed.*

For the appellant there was a brief signed by *J. A. Stone* and *G. Stevens,* and oral argument by *Mr. Stone.* Among references cited by them were *Pettit v. May,* 34 Wis. 666; *Eldred v. Oconto Co.* 33 Wis. 133.

For the respondent there was a brief by *Chas. H. Stone,* attorney, and *Grotophorst, Evans & Thomas,* of counsel, and oral argument by *Mr. Stone.* They cited, among other cases, *Coburn v. Harvey,* 18 Wis. 156; *Chippewa Falls v. Hopkins,* 109 Wis. 611, 85 N. W. 553; *Cooper v. Ins. Co. of Pa.* 96

Wis. 362, 71 N. W. 606; *Stahl v. C., St. P., M. & O. R. Co.* 94 Wis. 315, 68 N. W. 954; *Byrne v. Byrne,* 89 Wis. 659, 62 N. W. 413.

TIMLIN, J. Four pigs belonging to the plaintiff came upon the premises of defendant, who impounded three of them. The parties lived in the same town, and within twenty-four hours met and negotiated for the release of the pigs, the defendant demanding $5 damages as a condition of release, the plaintiff offering $1. After the lapse of twenty-four hours, no notice of application for appraisers having been given, without further demand, and while the defendant was still withholding the three pigs, the plaintiff brought replevin for four pigs. The officer seized the three distrained. The fourth was not withheld by the defendant. The defendant attempted to justify by answer in writing claiming the animals were taken up as strays and nowhere averred that they were taken damage feasant nor that they did any damage. The cause was apparently tried with reference to the right of the defendant to hold the animals under the statute relating to animals taken damage feasant. For want of a demand after the expiration of the twenty-four hours from the seizure, the court below dismissed the complaint and gave judgment for the defendant for six cents damages and costs.

The judgment ought to be affirmed if possible. But we do not see how this can be done without violating settled rules of law, the disregard of which operated to the prejudice of the appellant. To justify seizure and impounding the beasts they must be on premises in the possession of the seizor and doing damage, *i. e.* damage feasant. This was the common law. The statute somewhat extends the right to pursue the animals, but they must be doing damage. The damages need not be large, but there must be at least nominal damages claimed. The evidence entirely falls short of a justification

under the estray statute and the pleadings fall short of a justification under the damage feasant statute. On the other hand, assuming that the latter statutes control because the case was tried in the court below as one arising under such statutes, we have to meet the settled law that the person seizing the animals must within the time required by statute give the notice in writing there prescribed or his seizure and detention of the animals becomes wrongful. *Taylor v. Welbey,* 36 Wis. 42; *Pettit v. May,* 34 Wis. 666; 2 Am. & Eng. Ency. of Law (2d ed.) 358; 2 Jacob, Law Dict. 186; *Warring v. Cripps,* 23 Wis. 460. The common-law rule invoked by the court below, that the distrainor has a reasonable time in which to notify the owner of the beasts, is superseded by the statute which requires notice in writing within twenty-four or forty-eight hours, as the case may be. Michigan cases cited by respondent are not in point, for there the statute gives the owner of the animals the right to have the damages assessed, while here the distrainor only appears to have that right. Sec. 1631 *et seq.* Stats. (1898). No demand after the statutory time for giving notice had expired was necessary.

By the Court.—Judgment reversed, and the cause remanded for further proceedings according to law.

ADY, Appellant, vs. BARNETT, Respondent.

February 1—February 22, 1910.

Contracts: Sales: Written order for goods: Ambiguity: Evidence of prior oral agreements: Trial: Abandoning cause of action: Foreign corporations: Doing business in this state: Interstate commerce: Appeal: Undertaking: Surety companies.

1. Ambiguity in a written order for goods, due to failure to state the name of the party from whom they are ordered, is removed by the filling of the order by the company whose agent received

it, the sending of an invoice corresponding therewith to the purchaser, and his acceptance of the goods.

2. A written order for goods, specifying prices and terms of payment, coupled with acceptance thereof, constituted a written contract, and in the absence of fraud or mutual mistake its terms cannot be varied by proof of a prior or contemporaneous oral agreement by the vendor's agent that the purchaser need pay for only so much of the goods as he might sell and that the unsold portion might be returned at any time.

3. A plaintiff should be permitted to abandon a separate cause of action stated in his complaint if no one is prejudiced by his doing so.

4. If, in an action upon a written order for goods, plaintiff states a separate cause of action based upon alleged oral agreements made at the same time, but abandons it at the trial because satisfied that he could prove it only by incompetent evidence, such conduct gives defendant no right to establish a defense to the cause of action on the written order by evidence of other contemporaneous oral agreements.

5. A shipment of goods from another state to a purchaser in this state by a foreign corporation pursuant to an order therefor taken by its agent in this state, constitutes interstate commerce, the soliciting of the order being part of the entire transaction, and sec. 1770*b*, Stats. (1898), is not applicable.

6. Where an undertaking on appeal is executed by a foreign corporation and is not accompanied by the certificate of authority, or certified copy thereof, which by sec. 1966—34, Stats. (1898), is made equivalent to the justification required of sureties by law, the appellant may properly be allowed to supply such certificate or copy and thus perfect the undertaking, even after the time for taking an appeal has expired.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Two causes of action are stated in the complaint. When the case was called for trial plaintiff gave notice that he had entirely abandoned the second cause of action and would make no claim for recovery thereon. The first cause of action was brought to recover the amount of an invoice of goods shipped by the National Medical Company, an Iowa corporation, to the defendant, and amounting to $36.75. The order

was taken by one Pike, a traveling salesman for the National Medical Company, and is as follows:

Order No.	8		June 30, 1906
M.	Wm. Barnett		
Ship to	La Valle, Wis.		
A			
How Ship	C. & N. W.	When	at once
Terms:	Aug. 1, 90 days.		

12 pints Liquid Koal	$8.00
6½ Gal. " "	7.00
3 Gal. " "	6.00
24 Pts. Lice Killer	5.00
6½ Gal. " "	2.25
10 Gal. Dip	6.50
6 Sprays	2.00
25 Pints Liquid Koal free	
10 Pints Dip "	
1 Pair Blankets "	
Statements 250 "	
Envelopes 250 "	

L. K. books & Eveory them in Ad'v matter.

[Signed] WM. BARNETT.

The National Medical Company, shortly after the receipt of the order, accepted the same and shipped the goods described therein, and forwarded to the defendant a bill for the amount of such goods under date of July 2, 1906, and, under date of July 3, 1906, wrote defendant as to the superiority of the goods over others of a like character. The defendant received the goods and placed the same in his store and allowed them to remain therein for some considerable length of time, apparently without making any sales. On November 5th the National Medical Company wrote defendant demanding payment. Under date of November 9th the National Medical Company notified defendant that it had made a draft on him for the amount of the bill. Some time thereafter the defendant returned the goods to the vendor.

The defendant interposed two defenses to the claim sued on: (1) That the goods were purchased with the understanding that they were not to be paid for until sold, and that the defendant should have the right to return the whole or any

part thereof at any time that he desired. (2) That the National Medical Company is a foreign corporation and failed to file its articles of incorporation with the secretary of state, as required by sec. 1770*b*, Stats. (1898), and therefore could not recover on the account sued on. The plaintiff brought suit as the assignee of the National Medical Company. The court submitted the following question to the jury: "*Q*. Did Mr. Pike have authority to bind the National Medical Company by agreements not incorporated in the written order?" To which the jury answered "Yes."

On this verdict judgment was entered for the defendant dismissing the complaint, from which judgment this appeal is taken.

For the appellant there was a brief by *Bentley & Kelley*, and oral argument by *F. R. Bentley*.

James A. Stone, for the respondent.

BARNES, J. There is no ambiguity about the order except that it fails to state the name of the party from whom the goods were ordered. The order was filled by the National Medical Company and an invoice of the goods corresponding therewith was mailed to defendant and he accepted the goods and placed them on his shelves for sale, so that the ambiguity referred to was removed by the parties themselves.

The order in question, coupled with the acceptance thereof, constituted a written contract. *Schultz v. Coon*, 51 Wis. 416, 8 N. W. 285; *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433; *McQuaid v. Ross*, 77 Wis. 470, 46 N. W. 892. By such contract the defendant agreed to pay the purchase price of the goods listed therein within ninety days from August 1, 1906. The defendant seeks to relieve himself from liability by showing a parol agreement with the agent who took the order, to the effect that defendant should be called upon to pay for only so much of the goods as he sold, and that he might return the unsold portion thereof at any time. The

agreement was made, if at all, prior to the signing of the order. Stated in another way, the attempt is made to establish by parol a commission contract in lieu of the one of absolute sale found in the writing. It is important to the business world that written contracts should have stability. If, in a case such as we have before us, without any attempt at reformation, a party may avoid the effect of the writing by showing that the making of the payment called for by the writing was contingent upon the sale of the goods, it is difficult to imagine a case where a written agreement would furnish any protection against evidence of contemporaneous parol agreements materially modifying the same. It is elementary law in this state that, in the absence of fraud or mutual mistake, proof of antecedent or contemporaneous verbal agreements between the contracting parties cannot be received to alter or control their written agreement. A large number of the cases so holding are cited in *Jackowski v. Ill. S. Co.* 103 Wis. 448, 454, 79 N. W. 757. The defendant does not claim that he did not read the order before signing or that he did not understand its contents or its legal effect. He simply asserts that he relied on the agreement of the agent that the provision as to payment would not be enforced unless he succeeded in selling the goods ordered. Defendant's counsel stated to the court, in support of his right to offer the evidence, that it was not offered to vary the terms of the written contract, but to prove other conditions to the contract not contained in the writing. The evidence, under the circumstances of this case, was just as improper for the purpose of adding to the contract as it was for the purpose of modifying it, but as a matter of fact it did modify the writing by substituting for the provision as to payment contained therein an entirely different provision. There are certain well-recognized exceptions to the general rule above stated, but we fail to see wherein the defendant has brought himself within any of those exceptions.

It is further urged that plaintiff pleaded a second cause of action in his complaint, which was based on alleged parol agreements between the defendant and the agent who took the order, and that inasmuch as the plaintiff showed by his pleading that the entire contract was not contained in the writing he should not now be heard to assert the contrary. At the opening of the trial the plaintiff announced in open court that he abandoned his second cause of action and would make no claim thereunder. It does not appear that the defendant was misled to his detriment by such action or that the essential elements necessary to constitute an estoppel exist. It is true that there is a rule of law which prevents a party from taking inconsistent positions in court. But where no wrong would be done to the court or to other parties by permitting a change of position, such change should on principle be allowed. *Green Bay & M. C. Co. v. Hewitt,* 62 Wis. 316, 327, 21 N. W. 216, 22 N. W. 588; Bigelow, Estoppel, 722, 723. If the plaintiff became satisfied that he could prove a cause of action set out in his complaint, by the introduction of incompetent evidence only, and therefore abandoned it, such conduct would not confer on the defendant the right to establish a defense to another cause of action by the introduction of improper evidence.

The respondent further contends that no recovery can be had because the plaintiff's assignor, the National Medical Company, was a foreign corporation and had not complied with the provisions of sec. 1770*b*, Stats. (1898), when the contract was made. The order was procured by an agent representing the corporation and was forwarded to it and filled, and the goods called for by the order were shipped from the vendor in Iowa to the vendee in Wisconsin. Transactions involving a physical transfer of merchandise from the possession and title of an owner in one state to the possession and ownership of a purchaser in another are interstate. The soliciting of the order for such goods is but an inherent

part of the transaction, and the transaction in its entirety constitutes interstate commerce, to which sec. 1770*b*, Stats. (1898), has no application. *Loverin & B. Co. v. Travis,* 135 Wis. 322, 115 N. W. 829; *Elwell v. Adder M. Co.* 136 Wis. 82, 116 N. W. 882.

The notice of entry of judgment in this case was served on November 1, 1907. The notice of appeal, together with an undertaking thereon, was served on October 29, 1909. The undertaking was executed by the United States Fidelity & Guaranty Company, a foreign corporation, and was not accompanied with any certificate from the commissioner of insurance showing that it was authorized to transact the business of suretyship in Wisconsin at the time the undertaking was signed. On January 24, 1910, the respondent served on the attorneys for the appellant a notice of motion to dismiss the appeal because no sufficient undertaking was given or filed on said appeal. Such motion was heard at the time the case was orally argued, and upon such argument the appellant was permitted to file a certified copy of a certificate of authority issued to the surety and authorizing it to transact a surety business in the state of Wisconsin from March 4, 1909, to March 1, 1910.

Sec. 3052, Stats. (1898), requires the execution of an undertaking for costs by two sureties in order to render an appeal effectual for any purpose. Sec. 3065, Stats. (1898), provides that such undertaking shall be of no effect unless the sureties justify in a manner provided therein. Sec. 1966—33, Stats. (1898), empowers surety companies authorized to do business in Wisconsin to execute undertakings like the one in question. Sec. 1966—34, Stats. (1898), provides, among other things, that the certificate of the insurance commissioner, or a certified copy thereof, as to the authority of the surety company to transact business, shall be equivalent to the justification required of sureties by law. In *Johnston v. Northwestern L. S. Ins. Co.* 107 Wis. 337, 83 N. W. 641,

this court held that an undertaking by a surety company, which was not accompanied by a certificate of authority to transact business in this state, or a duly certified copy thereof, was defective. It has been held under the statutes referred to that a service of a notice of appeal within the time limited by law that is not accompanied by any undertaking is not effective for any purpose, and that an undertaking could not be supplied after the time had expired within which the appeal might be taken. *Munk v. Anderson,* 94 Wis. 27, 68 N. W. 407; *Haessly v. Secor,* 135 Wis. 548, 116 N. W. 175. On the contrary, it has been held that undertakings upon appeal which are defective because of imperfect justification of the sureties may be perfected in this court. *Helden v. Helden,* 9 Wis. 557; *Smith v. C. & N. W. R. Co.* 19 Wis. 89; *Ulrich v. Farrington Mfg. Co.* 69 Wis. 213, 214, 34 N. W. 89; *Johnston v. Northwestern L. S. Ins. Co., supra; Oconto L. Co. v. Mosling,* 122 Wis. 440, 100 N. W. 824; *Haessly v. Secor, supra.* The certificate which was here lacking furnished evidence of the authority of the surety company to sign the undertaking, and was by the statute made equivalent to the justification of sureties as required by law. Sec. 1966—34, Stats. (1898).

We conclude that under the decisions cited the appellant might properly be allowed to supply the certificate in question even after the time had expired within which to take the appeal.

By the Court.—The motion to dismiss the appeal is denied with $10 costs in favor of the respondent, the same to be offset against the costs taxed in favor of the appellant. The judgment appealed from is reversed, and the cause is remanded with directions to enter judgment on the verdict in favor of the plaintiff and against the defendant for the amount due upon the first cause of action stated in the complaint.

BRENGER, Respondent, vs. BRENGER, Appellant.

February 1—February 22, 1910.

Divorce: Alimony: Allowance to husband: Division of property: Wife's separate property: Powers of court: Statutes: Rights of creditors: Exemptions: Trial: Findings of fact.

1. Authority to allow permanent alimony to a party in a divorce action or a portion of the property of the parties to one of them as a permanent settlement of their property rights, is referable, wholly, to the written law.
2. Permanent alimony is allowable out of the property and earnings of a divorced husband to his divorced wife, but not to the former out of the earnings and property of the latter.
3. The property of the husband and that of the wife derived from him, may be considered together in making a permanent adjustment of property rights upon a judicial termination of their marital relations.
4. Upon such termination no part of the separate property of the wife, not derived from the husband, can properly be divested and transferred to the husband or burdened by his debts.
5. In adjusting property rights of the parties in a divorce action, in case an estate shall have been during coverture conveyed to the wife by the husband to compensate her for care of him, and she shall have, without reasonable excuse, defaulted in that regard, the transfer should, by rules for judicial construction, be held to have been made upon condition subsequent, and, because of the default, should be restored to him and the condition thus created be then dealt with in settling matters respecting alimony to her or division of property between the parties.
6. Every provision for support in a judgment in a divorce action, whether it requires payment of money at intervals or in a gross sum, is to be regarded as alimony whether so expressly stated or not.
7. Judicial authority to make a division of property between the parties to an action for a divorce is referable solely to sec. 2364, Stats. (1898).
8. Under such section no power is given to take any part of the separate property of the wife not derived from the husband and transfer the same to the latter, while authority in that regard is expressly negatived by sec. 2372, Stats. (1898).
9. An allowance for support, adjudged in a divorce action, does not constitute indebtedness to the party in whose favor the allowance is made which can be reached by creditors of the latter.

10. Payments in money required by the judgment in a divorce action to be made by one party to the other as the portion of that other upon a division of the property of the parties may be reached by the creditors of that other.
11. The findings of fact in an action tried by the court should severally cover all of the material issues raised by the pleadings, carefully excluding all other matters, and the paper should be draughted from a strictly judicial viewpoint.
12. In settling the property rights of parties upon a judicial dissolution of their marriage contract it is proper, if not the duty of the court, to so provide as to preserve to them, subject to their individual rights after the separation of contracting to the contrary, their statutory exemptions from claims of creditors, while at the same time the indebtedness of each, in determining the property status to be dealt with in settling property rights, should be considered.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed in part.*

Action for divorce. The facts as found or appear by the evidence are these:

Plaintiff and defendant lived together as man and wife for some eighteen years prior to their separation which occurred some time before the action was commenced. Each of the parties, when they intermarried, had children by a former marriage, all of whom are now able to care for themselves. There are two children by their union, both also being of sufficient age to care for themselves and be of some help to the defendant with whom they reside. At the time of the marriage each had property of the value of some $800. They soon purchased eighty acres of land for a home, each paying one half of the consideration. They took the title to the realty jointly and made their home on the land till the separation. Some time after the first purchase, the parties acquired forty acres of land additional, which was practically paid for jointly, and the title taken accordingly. The income of the property, together with the sum of $1,400 in money which came to the hands of the plaintiff, belonging to his

children by his first marriage, was expended in making improvements on the farm and acquiring personal property for use in connection therewith.

Plaintiff's entire money investment in the property, including the children's fund and excluding the income, is $2,200, with interest on $800 from 1894, and on $1,400 from 1898. The entire money invested by defendant on the same basis is $800, with interest from 1894. The total value of the property is about $6,200. Plaintiff owes one of defendant's children $400 for work done on the joint property. He is about sixty-one years of age and defendant fifty-seven. She is a strong capable woman in fairly good health and of good ability to care for herself. He, for more than fourteen years, has been so crippled and infirm as to be unable to do anything. He is now blind and needs personal attention by others. In 1906, for the purpose of compensating defendant for rendering him needed attention and supporting him in their home, he quitclaimed to her his half of the homestead eighty, worth at least $2,000. From that time she has possessed and used all of the property of the parties substantially as if it were her own. A few days after defendant obtained the conveyance she placed a mortgage on the property to obtain $600, which she gave to her son by the former husband, and she now owes the debt. There is a judgment debt against plaintiff for the money belonging to his children, which he used as aforesaid, of $2,847.35, rendered May 8, 1908, but it was said on the trial, that could be settled for $1,500, in case of payment being made within a reasonable time. For a long period before the action was commenced, defendant treated plaintiff in a most cruel and inhuman manner. Such treatment was reprehensible to a high degree, before the defendant obtained the deed aforesaid, but was worse thereafter. She made his life miserable and practically forced him from his home and to subsist by charity. For over a year he has been a public charge because of defendant's bad treatment. He

has made repeated unsuccessful efforts to become sufficiently reconciled with her to enable him to obtain support in the home, and was compelled to commence this action in order to secure a part of the property described and devote it to his own use instead of having to depend on charity. She is entirely to blame for the unhappy condition. He has promised to reimburse the town which relieved his necessities. That will take about $200. He is indebted to his attorney for upwards of $100.

On the situation aforesaid the court concluded, as matter of law, and adjudged accordingly, that plaintiff was entitled to a divorce as prayed for and to have out of the property $200 to reimburse the town; also $100, and such other sum as he might have to expend, as expenses of the litigation; also to have his clothing and carpenter's tools and an allowance of $25 per month, payable every three months during his life. on the first days of January, April, July, and October in each year, the same to be a lien on all of the real estate owned by the parties, or either of them, and that subject to such lien and other existing liens and debts mentioned, defendant was entitled to all the property, with a privilege to discharge the lien for the quarterly payments aforesaid by paying to the plaintiff $2,000, and that she should pay the costs of the litigation.

She appealed.

For the appellant the cause was submitted on the brief of *John Bottensek.*

For the respondent there was a brief by *Eberlein & Eberlein,* and oral argument by *F. A. Eberlein.*

MARSHALL, J. The circuit court seems to have decreed that appellant should pay, as alimony, to respondent $25 per month and burdened her property with a lien to secure such payment. Doubtless it was supposed such method of treating the complicated property situation, in view of the wholly

dependent character of respondent and the very reprehensible conduct of appellant, was the most equitable one to adopt; that from a business, and humane standpoint as well, respondent could best be provided for in that way, and appellant had no reason to complain which equity could recognize.

The difficulty with the conclusion reached, is that it has no legitimate basis in the law to rest upon. A court of equity has very great power in a purely equity case and not much less, perhaps, in a purely statutory action as far as governed by equitable principles. But such power does not go to the extent of violating the written law.

The statute (sec. 2364, Stats. 1898) provides for compelling the former husband of a divorced woman to pay her alimony out of his estate and earnings during their joint lives, but not for compelling a divorced wife to bear such a burden on account of the husband. Neither the written nor the unwritten law justifies adjudging alimony to the former husband out of the divorced wife's property and earnings.

At this point we should say, in passing, we are speaking of alimony strictly so called, not division of property. The whole subject having been covered by statute, with the evident purpose of superseding the system at common law, we must find warrant in the written law for the disposition of property complained of, or condemn it.

As said by a standard text-writer:

"No instance could occur at common law in which the court would decree alimony to the husband; and, in the absence of any statute creating such liability, the wife would not be liable to an action for alimony, although she is enabled by statute to hold and transfer real and personal property in her own name and right." 2 Nelson, Divorce & Sep. § 904.

True, the commentator suggests that under a system permitting a husband's property to be transferred to the wife equitable considerations would seem to justify burdening the same with alimony in favor of the husband. But it is consid-

ered, that is a matter which the lawmaking power should deal with since the legislature planned to wholly provide for such matters, by the written law. Other courts have so held.

In *Somers v. Somers,* 39 Kan. 132, 17 Pac. 841, the court observed that there was no judicial authority for giving the husband alimony. "The domestic relations will have to be readjusted by the legislature, and an obligation cast upon the wife to support the husband, before such an action can be maintained," said the court, speaking evidently of an obligation to so support after a decree of permanent separation. It must be remembered in this connection, that permanent alimony, alimony after dissolution of the marriage contract, is wholly a creation of written law. It was not known to the common or ecclesiastical law.

One might fall into some confusion in studying this subject, as perhaps some text-writers have, if he did not keep in mind the principles above alluded to, upon reading here and there in elementary works that alimony may be granted in a divorce proceeding in favor of the husband, referring to such cases as *Small v. Small,* 42 Iowa, 111; *Barnes v. Barnes,* 59 Iowa, 456, 13 N. W. 441; *Garnett v. Garnett,* 114 Mass. 347, and some cases on the subject of temporary alimony. Upon examining them it will be found they are grounded on plain statutory provisions. Iowa Code 1873, sec. 2226; Gen. Stats. Mass. 1860, ch. 107, sec. 44. The latter is as follows:

"When a divorce is decreed for any of the causes mentioned in sections 7 and 10 the court granting it may decree alimony to the wife, or any share of her estate in the nature of alimony to the husband."

Similar statutes exist in Rhode Island. Pub. Stats. 1882, ch. 167, sec. 12. Also in North Carolina, Washington, and other states.

True, the basis for alimony is the moral and legal duty as well, of the husband to support his wife, and, formerly, was without any corresponding legal duty of the wife to support

the husband. However by sec. 1502, Stats. (1898), as amended by ch. 224, Laws of 1907, the wife, "being of sufficient ability," of a husband who is poor and dependent, is liable for his support. But that deals with the domestic relations of husband and wife during the existence of the marriage contract. It is a part of the system for the relief and support of the poor. It supplies a legitimate ground for further legislation in respect to the obligation of a divorced wife, but the legislature has not, as has been done in several other states, yet acted in the matter. The court must wait upon action by the lawmaking power.

In view of the foregoing, the law must be declared, thus: The granting or refusing of permanent alimony in a divorce action, is wholly referable to the statutes. There being no statute in this state authorizing granting of permanent alimony in favor of the husband out of the wife's estate, the court should not exercise jurisdiction to do so.

It is suggested that the decree may be regarded as a division of property and the judgment sustained on that ground. It would be somewhat difficult to so regard it on principle, and in face of the adjudications of this court. The award to the respondent is expressly adjudged for "future support and maintenance." The conclusion of law upon which the decree is based, is in similar language, and is based on the finding of fact, "that the plaintiff is entitled to an allowance for support of $25 per month," as long as he "shall live." The allowance has all the characteristics of alimony and none of a division of property. Sums of money to be paid at intervals for support of a party to the marriage relation, in cases demanding alimony, are such and must be treated accordingly. *Bacon v. Bacon,* 43 Wis. 197. 'Every provision for *support* in such a case, whether the same be payable at intervals or in a gross sum, is to be regarded as alimony, whether so expressly stated or not.' *Blake v. Blake,* 68 Wis. 303, 32 N. W. 48; *Maxwell v. Sawyer,* 90 Wis. 352, 63 N. W. 283; *Palica v. Palica,* 114 Wis. 236, 90 N. W. 165.

The foregoing stated principles must not be lost sight of or allowed to produce confusion by loose administration, particularly because they have been long established in the jurisprudence of this state and apply in many situations as rules of property.

If it were proper to consider the allowance to respondent of a life annuity of $25 for his support, in connection with the option given appellant to discharge the obligation by paying the sum of $2,000, as a division of property, we would still, in an effort to sustain the judgment, have to deal with the insuperable difficulty that the court in making the division took into consideration property of the appellant which she did not derive from her husband, as part of the community property. Upon no other theory could the result embodied in the decree have been arrived at. Such theory is, in effect, plainly written in the findings. The entire value of all the property was about $6,200. The entire indebtedness of both parties, including what respondent had agreed to pay for his support after he was forced to leave his home, and the amount due for expenses of the litigation, was over $4,000. The value of appellant's property which she did not derive from her husband, appeared, with reasonable clearness, to be worth not less than $2,000, after deducting one half of the enhancement of the value of the realty by improper expenditure of the money belonging to respondent's children and her indebtedness to her son of $600. Thus the value of all property of both parties, less their indebtedness, was not more than the sum the court required appellant to pay respondent as a condition of being discharged from the burden of the annuity, such annuity and optional sum being evidently regarded as equivalents. In other words, appellant, in effect, was required by the decree to restore to respondent, for his own or his and his creditors' benefit, all the property she received from him and substantially all her other property as well. How can that be called a statutory division of property, or a just division from the standpoint of mere arbitration, even

if it were permitted to the court to so deal with the rights of parties?

The appellant, with all her faults, and evidently there were many, still was entitled to her legal rights and some degree of judicial mercy as well. Doubtless, in the mind of the learned court, there was very little of the latter element and we do not perceive anything in the record impairing his judgment in that regard, but the legal right of appellant to the full enjoyment of her separate property which she did not derive from her husband, was overlooked, and the legal effect of the disposition of property made was not appreciated.

The only right to make a division of property upon judicially dissolving a marriage contract is referable to sec. 2364, Stats. (1898), which provides that:

"The court may finally divide and distribute the estate, both real and personal, of the husband and so much of the estate of the wife as shall have been derived from the husband, between the parties and divest and transfer the title of any thereof accordingly, having always due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties and all the circumstances of the case. . . ."

Thus the jurisdiction affirmatively conferred to distribute the wife's property, is confined to such as she shall have derived from the husband. To render it doubly certain that no attempt would be judicially made to otherwise interfere with a wife's property, it was provided by sec. 2372, Stats. (1898), that "No judgment" in a divorce action "shall in any way affect the right of a wife to the possession and control of her separate property, real or personal, except as provided in this chapter. . . ." Thus it will be seen that the judgment here violated the affirmative and negative limitation of authority.

Looking to the effect of the judgment, it is no less bad. If it be considered a division of property, it not only includes the wife's separate property, not derived from her husband, as part of the fund for division, but practically took all there

is from appellant. If she should accept the option as to the $2,000, the sum she would then be required to pay and the debts would exceed the value of all property. If she should not take the option, the value of the annuity and the indebtedness would be an equivalent for the value of the property. Moreover the practical effect would probably be to take away from both in favor of creditors their statutory right of homestead and other exemptions. Her exemptions would be sacrificed to pay the annuity and the indebtedness, if not the latter alone, while the annuity, as respondent's portion on a division of the property, might be subject to claims of creditors. So it is quite within probability that, in case of an effort to pay the debts and support herself, and pay the annuity as well, appellant would not only utterly fail but both would be left in poverty notwithstanding at the start they had approximately $4,000 of exempt property.

If it could be held that the allowance of $25 per month is alimony, it would not be indebtedness which could be reached by creditors (*Kempster v. Evans,* 81 Wis. 247, 51 N. W. 327; *Daniels v. Lindley,* 44 Iowa, 567; *Jordan v. Westerman,* 62 Mich. 170, 28 N. W. 826); but whether support could be secured to respondent to any extent out of his nonexempt property to the prejudice of creditors, is by no means free from doubt.

So in any view we can take of the judgment, it not only violates appellant's legal and equitable rights, but leaves both parties, as regards property and future maintenance, in a very deplorable situation.

We are not unmindful of there being precedents where the situation was that of the wife having possessed herself of all the property and being wholly at fault, as in this case, and the court having dealt with the matter by allowing her to keep such property, requiring her to pay the husband semi-annually for life a sum thought to be equivalent to his portion, with an option to convert the property into money and divide it.

Snodgrass v. Snodgrass, 40 Kan. 494, 20 Pac. 203. But it should be noted that the annual payments were not for alimony by name or specified to be for support. They were expressly required on account of a division of property all of which was derived from the husband.

We may say, in passing, as an indication of the onerous burden put upon appellant here, that, in the cited case, the circumstances were fully as reprehensible as regards the wife as in this instance. The husband was an old man. The net property was $5,525, or more than twice the net in this case. Yet the burden placed thereon in favor of the husband, as his share of the property, was only one third the burden required to be borne by appellant.

In the foregoing we have not lost sight of the fact that the judgment indebtedness is said in the findings to be for money received by respondent on account of his children, and to amount to $2,400, which can be compromised with the judgment creditors for $1,500, or less. But it seems the finding is based on a stipulation made in open court that the judgment was entered "for the sum of $2,847.35, May 8, 1908," and testimony of the attorneys for the judgment creditor, that it could be "settled for the sum of $1,500, if done within a reasonable time and without further costs." No payment seems to have been made on the judgment. At this time it amounts to about $3,000. The idea that it could be settled for $1,500 rests on mere suggestion of the judgment creditors' attorney as aforesaid. There is no binding obligation to settle the claim for less than the amount due. So it does not seem there is any legitimate basis for the finding that the judgment was only for $2,400, or that the claim could be settled for $1,500, and for an adjustment of the property rights of the parties accordingly.

We are rather forced to the conclusion that the finding belongs to a class, often found troublesome and sometimes fatal to a judgment; those made by judicial sanction of a draft prepared by attorneys for the prevailing party, following

some general suggestions from the bench as to the disposition of the case that would be made. That is a very dangerous practice, in the judgment of the writer; a practice which fails to respond to the command of the statute that "the judge shall state in his decision separately: (1) The facts found by him; and (2) his conclusions of law thereon." As said, in effect, on another occasion, "Such practice, in the judgment of the writer, unless very closely guarded, might well be discontinued altogether."

"Experience shows that counsel, the most able, honorable, and conscientious, . . . after the close of a hotly contested case, are not in the frame of mind, ordinarily, best suited to drafting the findings which must express the judgment of the court. That is no criticism. It is only an acknowledgment of the natural infirmities of the most perfect of us. All are affected, regardless of ability or purity; the difference is in degree. The making of the findings is purely a judicial function." *Harrigan v. Gilchrist,* 121 Wis. 127, 396, 99 N. W. 909.

Except so far as sanctioned by custom, I know of no warrant for judicial findings to be made up of suggestions as to form and substance, by prevailing counsel, with or without general declarations from the judicial head as to conclusions. The calm sea level, so to speak, of the judicial view is required to respond to the spirit of the Code. It should be seen that these observations are on the writer's personal responsibility, but they are the result of surveys from the viewpoints of a practitioner, a circuit judge, and a member of this court. Doubtless where a judge scans proposed findings, eliminating everything not properly a part of such a determination as the statute contemplates, and seeing that all matters of material fact are covered, the preparation of the paper by counsel proves helpful and is without objection. A practice in that respect so guarded would greatly aid in the administration of justice and is, perhaps, necessary, especially in case of a heavy burden of judicial work.

If what has already been said does not fully justify the

criticisms made of the manner the findings were prepared, the following in connection therewith probably will:

There is no separate finding as to the value of the use of the farm during the time respondent was practically excluded therefrom, though there was ample evidence to justify one that it amounted to a considerable sum per year. There were sixty acres under cultivation, three horses, eleven cows, and all accompaniments of a farm property of considerable significance, and no debts to pay, or at least none were paid. In stating the amount of indebtedness of both parties, not only was the judgment debt of about $3,000 without warrant considered as $1,500, but only $400 additional was taken into consideration, making $1,900. There was omitted nearly $1,500 of the judgment indebtedness, $600 of appellant's indebtedness, $200 due from respondent for his support, his expenses of the litigation, amounting to at least $150, making the whole sum $4,500. Not only were there these omissions, but in determining the net property the finding is to the effect that the total gross amount is at least $6,200, leaving as the minimum net $5,300, whereas it will be seen, at a glance, that, on such basis, the net is $4,300, while in view of the other debts disclosed in the finding or the uncontroverted evidence the net is about $1,900, out of which appellant was required to pay, as before indicated, $2,000 or its equivalent. This is at the expense of repeating somewhat with substantially the same results as before.

The judgment as to the property must be reversed for the various fatal errors, prejudicial to the legal rights of the appellant, which we have pointed out. It is thought best in remanding the case, to give definite directions as to closing the matter which the reversal will leave open. In doing so we must take into consideration and give due effect to these particular matters:

(a) Under the facts respondent is not legally or equitably entitled to any alimony or any part of the appellant's prop-

erty. He is not of sufficient ability to make provision for her. As between the two, she neither needs anything from him nor deserves anything.

(b) The undivided one-half of the homestead forty and one other having been deeded to appellant to secure support and nurture of respondent, in his helpless condition, during the balance of his life, and she having defaulted in that respect without any reasonable ground therefor and intensified the wrong by, in practical effect, driving him from home to be an object of charity, subject to the wrong being judicially redressed, a situation exists for application of the rule of *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118, and similar cases, viz.: In case of a conveyance by an old person of his property to another to secure from such other support and attention during the rest of his days, and the consideration wholly failing, without reasonable excuse on the part of the grantee,—a court of equity will, by rules for construction, hold the conveyance to have been made upon condition subsequent and deal with the situation accordingly.

(c) While the court should not endeavor to frame a judgment so as to enable debtors to escape payment of their just debts, it should exercise care not to deprive them, in a case of this sort, of the benefits of the statutory policy to protect such persons in the enjoyment of sufficient property to reasonably protect them from coming to want.

(d) There is, as appears, substantially $4,000 of exempt property, the title to one half of which was in respondent before he made the transfer to appellant, which must be held for naught. Such one-half was then free from any adverse claim and will be again upon the entry of the final judgment, except the $600 mortgage, which mortgage, as between the parties, should be regarded as a lien only on appellant's interest in the realty, the respondent being protected by the right of subrogation.

(e) The total money investment in the property by appel-

lant is $800, whereas she has incumbered the same as indicated for $600. Respondent's money investment in the property is $2,200.

(f) The incumbrance on the exempt property of the value of about $4,200 is limited to the $600 of appellant's indebtedness. The burden on appellant's half of one other forty consists of the $600 mortgage, and the burden on respondent's half of the two forties, other than the homestead, consists of such mortgage as to one forty and the judgment upon which there is due more than the entire value.

(g) The appellant having had the use of respondent's property for several years, under her unperformed agreement, she should repair that default to some reasonable degree. What will be a just equivalent for such default cannot be definitely ascertained, but it satisfactorily appears that it will take at least $300. It is thought best to fix it at such sum rather than to open the case for further litigation, and to direct that in preparing the final decree such sum shall be adjudged to respondent, with costs heretofore taxed.

(h) The $1,400, which according to the findings was expended in improving the joint property and, in the main, if not wholly, the homestead part, so far as now represented in the one-half interest owned from the first by appellant, is property derived from the husband and subject to division under sec. 2364, Stats. (1898), so in the full settlement of property rights authorized by such section, that should be taken into consideration and, under the facts, should be in greater part, if not all, restored to respondent.

To recapitulate for further definiteness, the judgment appealed from, except as to the decree of divorce and award of costs to respondent, should be reversed.

(1) The transfer of a one-half interest in two forties of land by respondent to appellant should be adjudged of no effect and the cloud on title created thereby should be judicially removed.

(2) The $600 mortgage placed on the two forties by appellant should, as to appellant and respondent, be adjudged a lien on the former's interest in the realty only, but without prejudice to whatever rights the holder of the mortgage has.

(3) The judgment should so provide that, if respondent or any person claiming under him shall pay any part of the $600 mortgage indebtedness to relieve his part of the property from the lien thereon, respondent or such person shall be subrogated to the rights of the holder of the mortgage, as to the other one-half, for the purpose of reimbursement.

(4) The decree should adjudge to respondent $300 on account of rents and profits appellant has unjustly appropriated out of his property, thus accomplishing a full equitable restoration of such property to him.

(5) The judgment should deal with the restored situation as above, by divesting appellant of one third of her remaining interest in the homestead forty and vesting the same in respondent, and by establishing the title, right of possession, and enjoyment of the property in the parties according to their respective interests, due provision being made for subrogation to protect respondent from loss on account of the $600 mortgage.

(6) The costs heretofore taxed in the court below in respondent's favor should be regarded as affirmed, and the costs taxed in this court in appellant's favor should not be enforced against respondent, otherwise than by offsetting the same against sums adjudged to him in the court below.

If the result creates an unpleasant situation for appellant, she must bear in mind that it has been made necessary by her own bad conduct, and that no other disposition of the property seems practicable which will deal justly and safely with the respondent and at the same time preserve to both their statutory rights as to homestead and other exemptions. If the appellant, having secured by her appeal her legal and equitable rights, now fails to recognize respondent's rights so

that, for the little time he may probably live, he can enjoy the property which has been acquired by his capital, management, and industry, the courts will, doubtless, find a way to deal with the matter effectually. Her best interest lies in submitting with becoming humility to the inevitable. The respondent under the judgment will be awarded his property rights. She must respect them or suffer the result of remedies which courts will furnish. Her complaint as to violation of her legal and equitable rights has been fully heard as a result of her appeal, while the new disposition of property matters will accord with the legal and equitable rights of both. She will have about $2,600 worth of property and no indebtedness to speak of, except that contracted for the benefit of her son. Respondent will have about the same amount of exempt property and $1,300 in value of other property but face an indebtedness to the amount of some over $3,600.

Of course, the disposition of property by the judgment will not prevent the parties by themselves, or through friendly intervention of others, from making a different disposition by contract. Probably they will find it difficult to make a much different disposition, in face of the indebtedness, without danger of sacrificing their statutory exemptions, but the way will be open for them to make such sacrifice, if they see fit, though it is hardly for the court to do it of its own motion.

By the Court.—The judgment appealed from as to all except the dissolution of the marriage contract and for costs is reversed, and the cause remanded for judgment embodying those parts not reversed and provisions as to property rights as indicated in this opinion.

124 N W 1047

BLAHA and another, Appellants, vs. BORGMAN, Respondent. SAME, Respondents, vs. SAME, Appellant.

February 2—February 22, 1910.

(1, 6) *Appeal: Review: Findings.* (2–4) *Parol trust in land: Voluntary execution: Vendor and purchaser: Valid contract: Evidence: Relation back: Lien of judgment: Priorities.* (5, 6) *Secondary evidence: Letters: Destruction.* (7) *Deeds: Recording: Acknowledgment.*

1. A finding reciting a claim to an equitable interest in land, but declaring that neither of the claimants has in fact any legal or equitable right, title, or interest, will be considered on appeal as merely a conclusion of law, where the evidence as to detail facts is undisputed.
2. Although a trust in land declared by parol only is wholly unenforceable against the trustee, yet, if voluntarily executed by him at any time, it will become validated as of the date of the original oral agreement, and his deed will relate back to that date and take precedence over any interest meanwhile derived from him by another not an innocent purchaser for value,—in this case over the interest acquired by a purchaser at an execution sale under a judgment against the trustee, docketed after the date of the oral agreement.
3. A binding written contract for the sale of land gives to the purchaser an equitable interest consisting of the right to a conveyance upon performance by him, and where that performance has been completed and the entire consideration paid by him before the docketing of a judgment against the vendor, a subsequent conveyance by the vendor vests title in the purchaser as of the date when he became entitled to the conveyance.
4. A letter by the owner of land offering to sell it for a certain price, immediately responded to by the mailing to him of such price and a blank deed, all prior to the docketing of a judgment against the vendor, constituted a valid written agreement and performance by the purchaser, so that the deed, though not executed and delivered until after the docketing of such judgment, related back and had priority over the lien of the judgment.

[5. Whether it is permissible to establish by parol the contents of letters sent to a person in another state, with no proof whatever of efforts or inability to obtain the originals, not determined.]

6. The conclusion of the trial court that the destruction of papers was blameless and consistent with ordinary care under the circumstances, and therefore rendered secondary evidence of their contents admissible, has on appeal the impregnability of a finding of fact.
7. A deed bearing upon its face such a certificate of acknowledgment as the statute requires is entitled to record, notwithstanding the date of the certificate is earlier than the date of the deed.

APPEALS from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed on plaintiffs' appeal.*

Action to quiet title. Answer, with counterclaim, asked same relief in behalf of defendant. Both plaintiffs and defendant deraign title from one C. F. Smith: defendant, by a sheriff's deed on execution under a judgment docketed in the circuit court for Langlade county, March 18, 1902; the plaintiffs, by two deeds from Smith, both dated prior to said March 18th, but delivered subsequently. These two deeds ran, respectively, to one John Hartl and John Lewis, an undivided half to each. It was claimed that Hartl's deed was in performance of a contract, resulting from correspondence, to convey the land upon consideration fully paid prior to the docketing of said judgment. The deed to Lewis was claimed to be in acknowledgment and execution of a parol trust agreement made at the time Smith obtained the land prior to 1892 to hold an undivided half thereof for Lewis and another.

The court found the contract to convey to Hartl to be established by the evidence, and that he therefore had an equitable title to the property prior to the docketing of the judgment, and owned an undivided half by title superior to that of the defendant. The court further held that Lewis had no interest in the land prior to the docketing of the judgment, the parol agreement therefor being void, and that therefore the half interest conveyed to Lewis was in Smith, subject to the lien of the judgment, and by the later execution

sale was transferred to defendant. Plaintiffs appeal from the whole judgment. Defendant appeals from that part thereof which establishes plaintiffs' title to an undivided half.

For the plaintiffs there was a brief by *Goodrick & Goodrick,* and oral argument by *A. B. Goodrick.*

For the defendant the cause was submitted on the brief of *Nash & Nash.* As to the admissibility of secondary evidence of the contents of the letters, they cited 17 Cyc. 529; *Diener v. Schley,* 5 Wis. 483, 527; *Orr v. Le Clair,* 55 Wis. 93; *Newell v. Clapp,* 97 Wis. 104; *Menasha W. W. Co. v. Harmon,* 128 Wis. 177; *Bonner v. Home Ins. Co.* 13 Wis. 677; *Wis. R. L. Co. v. Walker,* 48 Wis. 614; *Speiser v. Phœnix Mut. L. Ins. Co.* 119 Wis. 530; *Bruger v. Princeton & St. M. Mut. F. Ins. Co.* 129 Wis. 281; *Kohl v. Bradley, Clark & Co.* 130 Wis. 301; *Burton v. Driggs,* 20 Wall. 125; *Stebbins v. Duncan,* 108 U. S. 32; Jones, Ev. (2d ed.) §§ 17–19, 213, 214, 217, 218.

Dodge, J. 1. Considering first the plaintiffs' appeal: The judgment denying their title to the half interest covered by the deed to Lewis was predicated upon a finding reciting Lewis's and Forbes's claim to an equitable one-half interest, but declaring that neither J. C. Lewis nor C. E. Forbes had in fact any legal or equitable right, title, or interest. We cannot consider this part of the finding other than a conclusion of law, for the evidence as to detail facts is undisputed. It appeared that for two or three years prior to 1892 Smith was buying tax titles and thereby acquired the land in dispute amongst others. The testimony of Lewis is substantially that "myself and Forbes each had a quarter interest in such lands. Smith held the legal title. He held it pursuant to oral agreement between him, myself, and Forbes as to the subsequent disposition of the land. That agreement was that, as fast as the land was sold or redeemed, Smith was to receive one half interest and Forbes and I one quarter each

or the other half." Certainly, if the legal title were held by Smith under a written contract to the same effect as that shown by this evidence, Forbes and Lewis would be equitable owners of one half and their interest would be superior to any judgment or execution claim against Smith. Further, it appears without dispute that some time prior to 18th of March, 1902, Smith sent to Lewis a deed of the undivided one-half, which, owing to some infirmity or incorrectness, was returned by Lewis, and subsequently, and after the docketing of the judgment, Smith delivered the deed in evidence, a quitclaim deed of an undivided one-half interest to Lewis. All these facts are established without reference to certain secondary evidence of correspondence the admissibility of which is denied by defendant. The rule is thoroughly settled that a trust in land declared by parol only, although wholly unenforceable against the trustee, has yet enough of vitality so that if voluntarily executed by the trustee at any time it will become validated as of the date of the original oral agreement. Such a deed is said to relate back to the oral agreement and to take precedence over any interest meanwhile derived from the trustee by another not an innocent purchaser for value. *Main v. Bosworth,* 77 Wis. 660, 46 N. W. 1043; *Davenport v. Stephens,* 95 Wis. 456, 458, 70 N. W. 661; *Schumacher v. Draeger,* 137 Wis. 618, 119 N. W. 305. The situation disclosed by the above-quoted evidence falls so completely within the reasoning and the principles of the above-cited decisions that we can entertain no doubt that their rule controls it, nor that it establishes an equitable title in Lewis and Forbes prior to the docketing of the judgment under which defendant claims, upon which the execution sale has no effect, and for that reason, without considering others urged by plaintiffs, the portion of the judgment awarding defendant such an undivided one-half is erroneous and must be reversed.

2. Upon defendant's appeal the sole question of controversy is whether a binding written agreement satisfying the

statute of frauds for the sale of an undivided interest in the land to Hartl had been made by Smith prior to the docketing of the judgment. Defendant concedes that, if such existed, the judgment and execution sale thereunder can have no effect upon the equitable interest thereby created. That equitable interest was of course a right to a conveyance upon the performance of the purchaser's part of the contract. If that performance had been completed and the entire consideration paid prior to the docketing of the judgment, that equitable title was complete and comprehensive and left in Smith nothing but a bare, dry legal title which it was his duty to convey. Whenever he did so, such conveyance served to vest a legal title as of the date when the duty arose. *Church v. Smith,* 39 Wis. 492; *Krakow v. Wille,* 125 Wis. 284, 103 N. W. 1121; *Foster v. Lowe,* 131 Wis. 54, 60, 110 N. W. 829; *Gilbert v. Auster,* 135 Wis. 581, 116 N. W. 177; *Western L. & C. Co. v. Copper River L. Co.* 138 Wis. 404, 411, 120 N. W. 277.

The evidence received by the court over objection to establish this agreement consisted in part of oral testimony as to the contents of certain letters written to Smith by one Hayssen as agent for Hartl and of letters received by Hayssen which had been destroyed. The admissibility of this evidence is vigorously assailed by defendant's counsel. The question is a grave one whether it is permissible to establish by parol the contents of letters sent to a person in another state, with no proof whatever of efforts or inability to obtain the originals. Such question, however, we deem unnecessary of decision, since no such evidence will be considered. After some letters from Hayssen to Smith, the contents of which we disregard, there came from Smith to Hayssen a letter the contents of which was proved by parol over objection. It appeared that Hayssen, who was a farmer, of no business habits or business experience, was at that time county clerk; that while such clerk he made it a practice to retain correspond-

ence, check stubs, and other papers, but when he retired from office in the following year, having no place convenient for their preservation, he promiscuously destroyed such papers. It was then a year after this correspondence had taken place; there was no suggestion of probability that its preservation would ever become important; defendant had made no move to assert his judgment lien specifically against this land. Search for the letter had failed to produce it at time of trial, and the witness was reasonably sure that it had been destroyed years before the trial in common with these other papers. Upon such showing we think the foundation was laid for secondary evidence of the contents of the letter. Inability to produce the original was fully established, and the destruction of correspondence and other papers by Hayssen was of such a character that a trial court in its discretion might well consider it blameless and consistent with ordinary care under all the circumstances. Such a conclusion has the impregnability on appeal of a finding. *Hupfer v. Nat. D. Co.* 119 Wis. 417, 427, 96 N. W. 809. That letter expressed an offer by Smith to sell his interest in this specific land for $100, to which Hayssen, as agent for Hartl, immediately responded by mailing to Smith an inclosure containing the $100 and a blank deed, all prior to the docketing of the judgment. The deed was not acknowledged and delivered to Hayssen until subsequent to such docketing. We think this evidence fully supports the court's finding that a written agreement signed by the party to be charged had been completed and the entire purchase price paid before the origin of the lien under which defendant claims title, so that the entire equitable title had been acquired by Hartl, and so that the deed to him when executed and delivered related back to a date when defendant's lien had no existence. From it must result affirmance of that portion of the judgment from which defendant appeals.

An objection is urged by the defendant to the evidence used

to establish the contents of several of the deeds upon which plaintiffs' title is asserted to be based. That evidence was the original books of record from the register's office disclosing the deeds; and also the testimony of the clerk who wrote those records to the effect that they were exact and correct copies of the originals. So far as the deeds were duly acknowledged so as to be entitled to record, this objection seems to be entirely met by sec. 4156, Stats. (1898), which provides that the record shall be received in evidence without further proof thereof. The deed from Smith to Lewis, so far as appears by the printed case, was so executed as to be entitled to record. It bears a certificate of acknowledgment dated March 1st, while the deed itself is dated March 7th. But this discrepancy, however it may be explained, does not overcome the fact that the paper on its face bore such a certificate of acknowledgment as the statute requires to entitle it to record. We think that record was properly admitted in evidence.

By the Court.—Judgment is reversed on plaintiffs' appeal and remanded with directions to enter judgment in accordance with the prayer of the complaint. The defendant to take nothing on his appeal.

STEFFEN, Administrator, Appellant, vs. MCNAUGHTON, Respondent.

February 2—February 22, 1910.

Automobiles: Dangerous machines: Liability of owner for negligence of chauffeur: Scope of employment.

1. An automobile is not inherently or *per se* a dangerous machine so as to render its owner liable on that ground alone for injuries resulting from its use.
2. The owner of an automobile is not liable for injuries caused by his chauffeur's negligent operation of the machine at a time when the chauffeur was using it for his own personal and pri-

vate purpose, not within the scope of his employment, and without authority or consent, express or implied, of the owner.

3. Where, under his contract of employment, a chauffeur was to furnish his own meals and, impliedly, might leave the service for such time at noon as was necessary for that purpose, his employment and the relation of master and servant were temporarily suspended during such time; and if in going to his home for his midday meal he used his employer's automobile without authority or permission he was not, while so doing, acting within the scope of his employment, the circumstances not being such as to show that he was merely availing himself of a privilege impliedly granted to facilitate his labor and service or in furtherance of the employer's interests.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

On July 3, 1907, Anna Steffen was struck and killed in the city of Appleton by an automobile which was operated by the chauffeur of the defendant. The deceased came from Lawrence street, running east and west, and was crossing a part of State street, running north and south. As she approached State street from the west on Lawrence street she signaled a street car coming from the south on State street to stop. The car waited for her, and when she was about midway between the curb and the street car she turned her head and saw the automobile approaching from the north. She stopped, hesitated, and probably turned, and had taken a step backward when she was struck. She died shortly after. The chauffeur had had about five months' experience in the handling of automobiles and had been in the employ of the defendant a little less than two months. At the time of the accident the chauffeur was alone in the automobile and was going to his home for dinner. There is evidence that he saw the deceased step from the curb when he was about 150 feet from her; that he continued on his course without slacking the speed of the car, and that he attempted to pass between her and the curb. He claims that the deceased caused the collision by negligently stepping back toward the curb and in

front of the automobile; that he had turned toward the curb to pass her, and that it was impossible for him to avoid the collision because the space between her and the curb was insufficient for him to pass. The evidence varies much as to the rate of speed at which the car was traveling. The distance between the curb and the street car was about twenty feet, and the deceased was struck when nine or ten feet from the curb. The automobile was a five passenger, thirty horsepower machine. It was 112 inches long and sixty-seven inches wide. It weighed between 3,000 and 3,500 pounds. The chauffeur had full charge of the automobile under the direction of the defendant and his family and under his contract of employment. Under the contract of employment the defendant did not furnish the chauffeur with his meals, and the chauffeur went to his home for them. During the chauffeur's employment by the defendant he had taken the machine to a shop for repairs, and had taken and used it to go to his dinners, perhaps ten times. He had not been directed by his employer to use the machine for this purpose and he had never obtained permission so to use it. The defendant testified that he did not see the chauffeur so use the machine and that he did not know that he so used it. This is an appeal from the order of the court directing a verdict for the defendant and from the judgment on the verdict.

For the appellant there was a brief by *J. Elmer Lehr,* attorney, and *H. C. Sloan* and *A. M. Spencer,* of counsel, and oral argument by *Mr. Sloan.*

For the respondent there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

SIEBECKER, J. The questions as to the defendant's liability which arise if it be assumed that the evidence permitted the inferences that the chauffeur's negligence was the proximate cause of decedent's injuries, and that she was free from contributory negligence, are these: First, Is an automo-

bile *per se* a dangerous machine? And, secondly, Was the chauffeur acting within the scope of his employment while driving the car at the time of the accident?

Upon the first inquiry we discover nothing in the construction, operation, and use of the automobile requiring that it be placed in the category with the locomotive, ferocious animals, dynamite, and other dangerous contrivances and agencies. When properly handled and used, automobiles are as readily and effectually regulated and controlled as other vehicles in common use, and when so used they are reasonably free from dangers. The dangers incident to their use as motor vehicles are commonly the result of the negligent and reckless conduct of those in charge of and operating them, and do not inhere in the construction and use of the vehicles. It is well known that they are being devoted to and used for the purposes of traffic and as conveyances for the pleasure and convenience of all classes of persons and without menace to the safety of those using them or to others upon the same highway when they are operated with reasonable care. The defendant cannot therefore be held liable upon the ground that the automobile is a dangerous contrivance. This view has been adopted by the courts in the following cases: *Slater v. Advance T. Co.* 97 Minn. 305, 107 N. W. 133; *McIntyre v. Orner,* 166 Ind. 57, 76 N. E. 750; *Lewis v. Amorous,* 3 Ga. App. 50, 59 S. E. 338; *Jones v. Hoge,* 47 Wash. 663, 92 Pac. 433; *Cunningham v. Castle,* 127 App. Div. 580, 111 N. Y. Supp. 1057.

Whether the chauffeur, at the time of the accident, was acting within the scope of his employment involves an inquiry into the contract of his employment and the relation of his acts at the time of the accident to the service he actually performed pursuant to his employment. The facts are that under his contract of service with *John McNaughton,* the owner of the automobile and the defendant in this case, he was to care for and operate the machine at the request and direction of the defendant or any member of his family; that he

was to devote his time to the performance of such services during the day and was to perform the actual duties of a chauffeur; that the defendant did not undertake to furnish him his meals, and for his midday meal he was allowed to go to his home, about one mile distant from the defendant's residence, where the automobile was kept; that he usually walked to his home for this meal; that he had used the automobile probably ten times to make this trip without obtaining the permission or consent of the defendant or any member of his family so to do; that he so used the machine on the day in question; and that he passed in and out of the defendant's premises adjacent to the house on such occasions, and that the defendant was at his home on some of them. The defendant testifies that he at no time gave permission to or authorized the chauffeur to so use the automobile and that he had no knowledge that it was being used by him for this purpose.

It is obvious from the conditions of the contract of employment that it did not embrace the use of the automobile by the chauffeur for going to his meals; and the question, therefore, is: Do the facts warrant the inference that this use of it by the chauffeur was, under the circumstances of the case, "a permissive privilege granted to [him], of which he availed himself, to facilitate his labor and service, and . . . equally connected with it and the relation of master and servant?" *Ewald v. C. & N. W. R. Co.* 70 Wis. 420, 428, 36 N. W. 15. It is strenuously urged that the evidence on this subject permits of such an inference. This contention is made on the grounds that the chauffeur used this machine to further his master's interests; that he thereby reduced the time for getting his meals and thus was able to devote more time to the service of the defendant; that the defendant gave him the control of the machine for the day without restriction, thereby enabling him to use it for this purpose; and that these and all the other conditions of his employment and service make the use of the machine on these occasions one

within the privileges of his service for facilitating his labor and service, thus bringing it within the scope and course of his employment. We are of opinion that the facts of the case do not permit of this inference. The conditions of the contract of employment, under which the chauffeur was to provide himself with meals, carried with it the further condition that he was to have the required time at noonday, and might leave the service for such a period of time as was required under the circumstances for this personal and private purpose. While he was so engaged his employment and the relation of master and servant were suspended for the time being, unless the facts of the case show that the defendant consented to the chauffeur availing himself of this use of the machine to facilitate his labor and service and in furtherance of the defendant's interests. The evidence will not support this inference. It is reasonably clear and certain that the defendant by his words, acts, and conduct never gave consent or permission to, nor did the contract of employment authorize, such a use of the machine by the servant. The facts and circumstances fail to show that the chauffeur was performing an act in obedience to an order or direction of the defendant or a member of his family, or that he was doing something with the implied consent of the defendant. The law governing the liability of a master for the acts of the servant in this class of cases is embodied in the following comprehensive statement:

"For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instruction given, and the circumstances under which the act is done, the master is responsible." *Ritchie v. Waller,* 63 Conn. 155, 160, 28 Atl. 30.

While the rule of such liability may readily be comprehended, its application to the varying facts in cases of this class is often attended with difficulty. The ultimate inquiry

usually resolves itself into one of fact, under the particular evidential facts and circumstances of the case. Other cases, similar in their nature and circumstances, are of service as an aid to the court in ascertaining what conditions are deemed to be within or without this rule of liability. We cite the following as bearing on the subject: *Joel v. Morison,* 6 Car. & P. 501; *Maddox v. Brown,* 71 Me. 432; *Slater v. Advance T. Co.* 97 Minn. 305, 107 N. W. 133; *Jones v. Hoge,* 47 Wash. 663, 92 Pac. 433.

Upon these considerations it must be held that the facts in evidence do not permit of the inference that the chauffeur at the time of the accident was acting in the execution of the defendant's business, or that the defendant granted him the privilege of using the machine on this occasion to facilitate his labor and service; and that the acts of the chauffeur were not connected with his service and were not performed within the course of his employment.

This conclusion disposes of the case, and no other question need be considered.

By the Court.—Judgment affirmed.

St. Croix Timber Company, Respondent, vs. Joseph and others, Appellants.

February 2—February 22, 1910.

Equity: Jurisdiction: Liens on logs: Property as surety: Offsets of principal debtor against claims of lienors: Compelling application: Marshaling assets: Foreclosure of liens: Parties: Demurrer.

1. Where a court of equity has jurisdiction over some substantial portion or incident of a controversy such jurisdiction will extend to and embrace the whole subject matter of such controversy.
2. Where the owner of logs is not personally liable for payment of lienable claims for labor performed on the logs for a con-

tractor, but the logs occupy the position of surety for the payment, such owner is entitled to equitable relief *quia timet* if, by collusion between the claimants and the contractor, who is insolvent, the claimants have refrained from applying on their claims debts due from them to the contractor which are the subject of equitable setoff and would extinguish the claims, and are proceeding to enforce liens upon the logs.

3. In an action by the owner of logs for such relief the lien claimants must, except for the setoffs, have all the advantages of an attachment of the logs and foreclosure of their liens by separate and independent actions; and if anything is found due to any of them the liens therefor of all those so prevailing will be foreclosed by the judgment and, unless redeemed, a single sale of the logs in their behalf will be directed.
4. The equitable jurisdiction in such case is supplemented by the jurisdiction to marshal assets as well as to marshal securities.
5. The foundation of the owner's right to relief in such case being the existence of valid lienable claims against the contractor, from which the logs should be relieved by the application of the offsets, no cause of action is stated against lien claimants whose right to a lien is expressly negatived by the complaint.
6. The contractor, being the principal debtor, is a necessary party to the action.
7. Supplies advanced by the owner of the logs to the contractor for his camps having been put by the contractor into a store conducted by himself and a partner and then sold on credit to the lien claimants, and the contractor, after becoming insolvent, having assigned his interest in the goods and the accounts to his partner, who claims to own the same, such partner is, under sec. 2603, Stats. (1898), a proper party to the action.
8. A general demurrer to a complaint will be overruled if a cause of action is stated as to some, though not all, of the defendants joining in such demurrer.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The cause was submitted for the appellants on a brief signed by *Crownhart & Foley,* attorneys for *Sarkis Joseph* and *Charles Domitt,* and by *Dietrich & Dietrich,* attorneys for the other appellants; and for the respondent on the brief of *Luse, Powell & Luse.*

Among references cited upon the part of the appellants were the following: *Stein v. Benedict,* 83 Wis. 603, 53 N. W.

891; *Ellis v. Southwestern L. Co.* 102 Wis. 409, 78 N. W. 583; *Richards v. Allis,* 82 Wis. 509, 52 N. W. 593; *Ill. S. Co. v. Schroeder,* 133 Wis. 561, 113 N. W. 51; *Magnuson v. Clithero,* 101 Wis. 551, 77 N. W. 882; *Munger v. Lenroot,* 32 Wis. 541; *Turner v. Duchman;* 23 Wis. 500; *Blake v. Van Tilborg,* 21 Wis. 672.

Counsel for the respondent cited, among other authorities, *Dobie v. Fidelity & C. Co.* 95 Wis. 540, 70 N. W. 482; *Momsen v. Noyes,* 105 Wis. 565, 81 N. W. 860; *Goss v. Lester,* 1 Wis. 43; *Pendleton v. Beyer,* 94 Wis. 31, 68 N. W. 415; *Smith v. Dickinson,* 100 Wis. 574, 76 N. W. 766; *Draper v. Brown,* 115 Wis. 361, 91 N. W. 1001; *Ellis v. N. P. R. Co.* 77 Wis. 114, 45 N. W. 811.

TIMLIN, J. After averring that the plaintiff is a foreign corporation licensed to do business in Wisconsin, the complaint set forth in detail the ownership by the David Tozer Company of certain described lands in Wisconsin and Minnesota, and by the plaintiff of certain described lands in Wisconsin. For the purpose of having the timber on these lands cut, hauled, and delivered afloat in the Spruce river during the logging season of 1908–1909, the David Tozer Company made two contracts and the plaintiff one contract with the defendant *Sarkis Joseph.* The contracts were substantially similar in their covenants and requirements. The two made by *Sarkis Joseph* with the David Tozer Company were made on October 24, 1908, and that by *Sarkis Joseph* with the plaintiff on December 26, 1908. *Sarkis Joseph,* for the purpose of carrying out these contracts, established three camps, two of them for housing and feeding the men and teams necessary to carry out the David Tozer Company contracts, and one for like purposes with reference to all three contracts. The logs from the David Tozer Company land were marked with a certain log mark; those from the plaintiff's land with a different log mark. A quantity of logs was cut and delivered in the Spruce river. The logs

from the different camps are there commingled and are now in the Spruce, Tamarack, and St. Croix rivers.

Numerous averments are made tending somewhat to show that *Sarkis Joseph* performed substantially each of these three contracts. No express averment is found showing the extent to which performance was carried or the number or quantity of logs delivered. But this is not essential with respect to the lien claimants defendant.

Under the statutes of this state (secs. 3329–3342*b*, Stats. 1898), which give to any person who shall do or perform any labor or services in cutting, hauling, felling, etc., of logs, or timber, etc., a lien upon such material for the amount due or to become due for such labor or services, eleven person employed by or contractors of *Sarkis Joseph* filed such liens against these logs so delivered and being in the rivers above described. Among these eleven persons were the defendants *M. H. Carroll,* who filed a lien for $330, *Maggie Carroll* for $160.93, *Joe Carroll* for $83.33, *Willie Carroll* for $31, and *Jennie Carroll* for $63.60. These defendants last above named were employed by *Sarkis Joseph,* and each performed labor and services entitling him or her to a lien on the logs. This labor and service was paid for in part by *Sarkis Joseph,* and the latter also furnished merchandise to these lien claimants for which they owed *Sarkis Joseph,* and the amount thus owing from each, if applied to or offset against his or her claim for lien, would extinguish such claim. The defendant *Hans Wester* also filed a lien for $371.44 for the labor and services of himself and his team of horses, part of which has been paid, and *Wester* is indebted to *Sarkis Joseph* in such amount that, if this indebtedness were applied in offset of his lien claim, the lien claim would be thereby extinguished. *E. O. Kreiner* has filed a lien for $1,275, which has been paid in part, and *Kreiner* is indebted to *Sarkis Joseph* in an amount equal to or in excess of the lien claimed and it should be offset against the latter; that if this be offset or applied in payment, the lien claim of

Kreiner will be discharged. *James Bailey,* contractor, who performed labor and services within the statute, filed a lien for $323.08 and began a suit to foreclose his lien. *Sam Genung,* under a like contract, performed labor and services on these logs, filed a lien for $196.15, and began action to foreclose this lien. They have been paid in part, and they are each indebted to *Sarkis Joseph* in an amount which, if offset against their respective lien claims, would extinguish and discharge such claims. *Oscar Norine,* pursuant to a contract with *Sarkis Joseph,* performed labor and services on these logs and has filed a lien for $287.30. He was paid in part, and he is indebted to *Sarkis Joseph* in an amount which, if offset against his lien, would extinguish the same. *Fred A. Hodge,* who has filed a lien under this statute for $834.32, performed no labor or service, but furnished certain teams of horses, *Hodge* not being the owner of said teams nor employed or working with them. *Hodge* has been paid in part for furnishing horses, but he has no valid lien or claim for lien against the logs. The David Tozer Company since the making of said contracts with it has paid on account of the contracts to *Sarkis Joseph* and by his authority to the other defendants herein, for services rendered by them, an aggregate of about $28,000, which said sum paid *Sarkis Joseph* for all the work done under said two contracts except $215, which is still due him. The plaintiff paid under its contract to *Sarkis Joseph* and to the other defendants upon his order $9,504.10, which paid *Sarkis Joseph* for all the work done on its contract with him except $514.33, which is still due him. This is quite immaterial, except as showing that a balance of $729.33 belonging to *Sarkis Joseph* remains in plaintiff's hands which should be applied equitably when it can be ascertained how and to whom, and as showing that *Sarkis Joseph* is not indebted to the plaintiff or the Tozer Company for advances on the contracts mentioned. The Tozer Company and the plaintiff each furnished to the defendant *Sarkis Joseph* a large amount of supplies, consisting

of goods, wares, and merchandise, provisions, and horse feed, for the boarding of the men and teams at the several camps, and neither the Tozer Company nor the plaintiff had any accurate means of knowing whether these supplies were all delivered or used or consumed at the camps where the work of putting in the logs was in progress. *Sarkis Joseph* fraudulently misappropriated a large amount of said supplies. About April or May, 1909, he became insolvent. Notwithstanding *Joseph* had fully paid the defendants for their work on the logs by way of money, supplies, and goods and by indebtedness owing by them and each of them to him, he conspired with said lien claimants to conceal these credits, and to file and prosecute claims for liens against the logs in question which were false and unfounded, and to enforce these claims and collect them and turn the avails over in whole or in part to *Sarkis Joseph*. The logs in question are all commingled and are in the counties of Douglas, Burnett, Polk, and St. Croix. The David Tozer Company sold and transferred all its logs to the plaintiff, and, in connection therewith, transferred any and all rights of action with reference thereto and upon the contracts in question, and all claims in any wise growing out of said contracts against *Sarkis Joseph* or any person claiming by, through, or under him, etc. Two of the lien claimants have already commenced actions for the foreclosure of their liens and the others threaten and intend so to do.

The lien claimants jointly demurred to the foregoing complaint on the ground that it did not state facts sufficient to constitute a cause of action against them and also for misjoinder of causes of action. The defendant *Sarkis Joseph* and the defendant *Charles Domitt* each separately demurred on the same grounds.

It is an elementary rule of equity jurisprudence that, where the jurisdiction of a court of equity exists over some substantial portion or incident of the controversy, such jurisdiction will extend to and embrace the whole subject matter

of such controversy. 1 Pom. Eq. Jur. (3d ed.) §§ 231–242. The lien claimants defendant have by statute in this state liens existing in favor of each upon the logs in question. The logs are commingled, those marked with the same mark not capable of separate identification, and also the persons working in one camp are shown to have performed work on both the Tozer logs and the logs which came from plaintiff's land. Each lien to a greater or less extent overlaps the other liens, and must be either prior to, subsequent to, or concurrent with the other liens on the same logs, and each may be thus affected by the amount of the other, at least in the matter of payment or redemption. Each lien is asserted by attachment following the filing of the lien claim, foreclosed by judgment at law following the attachment, and there may be a separate sale of the same group or batch of logs on each of several liens. There may be as many separate sales of logs as there are lien actions and as many separate actions as there are workmen or contractors, and those claiming liens for $200 or less may proceed in justice's court and others in superior court, and still others in circuit court, so as to prevent or make difficult consolidation. The plaintiff is the owner of all the property upon which these liens rest. Its property is security for their payment. This property is liable for the payment of these liens whether the plaintiff owes *Sarkis Joseph* or not on his contract. *Reindl v. Heath,* 109 Wis. 570, 85 N. W. 495, and cases. But the lien claimants are creditors of *Sarkis Joseph* and he is the principal debtor. It is averred that he is insolvent. Property may occupy the position of surety in law or equity. 27 Am. & Eng. Ency. of Law (2d ed.) 433, and cases in note 6; 1 Brandt, Suretyship & G. (3d ed.) § 43.

"Real suretyship arises where certain specific property can be taken to enforce payment of another's debt, or the performance of some duty owing by another, and the owner of such property, if he would save it, must pay or perform, but he is not personally liable in damages." Childs, Suretyship & G. p. 14, par. 22.

The owner of property in this condition is in a proper case entitled to the remedies given by equity. 1 Brandt, Suretyship & G. (3d ed.) § 369, and cases. This jurisdiction of equity is sometimes put upon the right of the surety in that court to exoneration, and sometimes, and more properly, we think, upon the equitable right of the surety to relief *quia timet;* that is, the right to have his property relieved of the threatened sacrifice thereof created by the unjust and illegal demand of the creditor by removing the incumbrance altogether by discharge, by equitable application of setoffs, by compelling the principal debtor to pay, or by reducing the demand of the creditor to its due and equitable proportion, and permitting the surety to redeem his property therefrom by payment of the true amount, if any amount is found due. 4 Pom. Eq. Jur. (3d ed.) § 1417, and cases in note; *Harris v. Newell,* 42 Wis. 687; *Dobie v. Fidelity & C. Co.* 95 Wis. 540, 70 N. W. 482; *Level L. Co. v. Sivyer,* 112 Wis. 442, 88 N. W. 317; Childs, Suretyship & G. 137, 138, and cases in notes. But, invoking this equitable remedy, the person whose property occupies the relation of surety is subject to equitable restrictions and limitations necessary for the protection of the creditor. Seeking equity he must do equity. He cannot, for example, ask to have certain property of the person who stands in the relation of principal to him applied on the claim of the creditor so as to discharge the surety's property and at the same time aver that the creditor has no claim. Such positions would be inconsistent. The foundation of his right to such relief in an action like this is that the creditor has a valid claim against the principal debtor from which the surety property should be relieved by the application upon that claim of property of the principal debtor or of offsets belonging to the principal debtor not otherwise available. No other rule would be just to the lien claimants. Childs, Suretyship & G. 11, 137, 138; *Dobie v. Fidelity & C. Co., supra; Level L. Co. v. Sivyer, supra; Momsen v. Noyes,* 105 Wis. 565, 81 N. W.

860. This equitable jurisdiction is in the instant case supplemented by the jurisdiction to marshal assets as well as to marshal securities, and here equity exacts the same concessions from its suitor. 4 Pom. Eq. Jur. (3d ed.) § 1414, and cases. This complaint must therefore be construed as admitting that a lienable demand exists in favor of each of the defendants who have filed liens except the defendant *Hodge*. In his case the complaint expressly negatives his right to a lien. As to him it states no cause of action. But *Hodge* joined in a demurrer with the other defendants against whom the complaint does state a good cause of action, and therefore he must avail himself of this defect otherwise. *Mark Paine L. Co. v. Douglas Co. Imp. Co.* 94 Wis. 322, 68 N. W. 1013.

With reference to the other lien claimants defendant, the complaint must be held to mean that, having a lienable claim, and a lien filed for a balance due for labor and services on these logs for which they were entitled to a lien, by collusion with the defendant *Sarkis Joseph* and with his consent they refrained from applying, against this balance of their lienable claim, demands due from each lien claimant to *Sarkis Joseph* which were equitably the subject of setoff against the lienable claim and which if set off would extinguish that claim. The lien claimants in this action thus must, except for the setoff, have all the advantages which could result to them from an attachment of the logs and a foreclosure of their liens by separate and independent actions, and the liens are in fact foreclosed by the decree to be made in an action like this if anything is found due on either of such liens, and, unless redeemed, proceed to a single sale in behalf of all who prevail. If the lien claim is found to have been discharged by payment or equitable setoff there is finding and judgment to that effect. The demurrers of the lien claimants were therefore properly overruled. The principal debtor is always a necessary party to such an action, and his demurrer was properly overruled.

With reference to the defendant *Charles Domitt* the case is not so clear. The complaint avers that *Domitt* and *Sarkis Joseph* were copartners carrying on a mercantile business at the time *Sarkis Joseph* was engaged in carrying out the contracts in question. The plaintiff and its assignor furnished *Sarkis Joseph* supplies for his camps, and a considerable part of these supplies were by him put into the store of *Domitt* and *Joseph,* and by the latter sold on credit to the lien claimants. Later *Sarkis Joseph,* becoming insolvent, assigned his interest in this stock of goods and in these accounts to *Domitt,* and *Domitt* claims to own the same. It is not averred that the transfer to *Domitt* was fraudulent, and the purpose of the pleader in making *Domitt* a party is not very clear. Our statute permits the joinder of causes of action only when they arise out of the same transaction or transactions connected with the same subject of action and belong to one of the classes specified in sec. 2647, Stats. (1898), and affect all the parties to the action. The complaint here avers that in each case there is a debt due from each lien claimant to *Sarkis Joseph,* the principal debtor, which, if offset against the lien claimed, will extinguish by payment that claim. Also that as a result of the transactions between *Sarkis Joseph* and the plaintiff and its assignor there is a balance due *Sarkis Joseph.* A majority of this court, however, are of opinion that *Charles Domitt* is a proper party under sec. 2603, Stats. (1898), and this is the only ground urged by respondent to sustain the order of the court below in overruling his demurrer. *Hausmann Bros. Mfg. Co. v. Kempfert,* 93 Wis. 587, 67 N. W. 1136; *Rowell v. Rowell,* 122 Wis. 1, 11, 99 N. W. 473.

By the Court.—The order overruling the several demurrers is affirmed.

BARNES, J., dissents.

FITZPATRICK, Administrator, Appellant, vs. LAKE SUPERIOR TERMINAL AND TRANSFER RAILWAY COMPANY and another, Respondents.

February 2—February 22, 1910.

Appeal: Review: Taking questions from jury: Railroads: Negligence: Death of employee: Contributory negligence: Special verdict: Inconsistency.

1. The conclusion of the trial court respecting sufficiency of evidence as to any fact in issue to present a jury question should not be disturbed unless it appears to be clearly wrong, giving due weight to the superior advantages of that court for discovering the truth.
2. In an action against a terminal railway company and also against a fuel company for death of a switchman who was crushed between a switch engine, on the side steps of which he was riding, and a box-car loader operated by the fuel company upon a parallel track, a nonsuit as to the railway company is *held* to have been properly granted, the evidence as to the duties and conduct of the fireman on the engine being insufficient to make it a question for the jury whether he was negligent, as alleged, in failing to keep a lookout ahead and to warn the deceased of his danger.
3. A finding by the jury in such case that it was not customary for the box-car loader to move upon its track opposite to or past the switch engine or cars when the switch engine was moving on its track, was not inconsistent with a finding that deceased was guilty of contributory negligence, there being evidence tending to show that the loader had been brought to a full stop on its track before the engine passed it and that deceased, though familiar with the manner in which the loader was handled, rode in the position he did without looking to ascertain where the loader was; and both such findings are *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The *Northwestern Fuel Company,* hereinafter called the *Fuel Company,* operated a coal dock at Superior. The *Lake Superior Terminal and Transfer Railway Company,*

hereinafter called the *Terminal Company,* operated two railway tracks upon said dock; the westerly track, that nearest the coal bins, being designated as track No. 2, and the other track No. 1. The dock was about 1,000 feet long, extending north and south, and the tracks extended its entire length. The *Fuel Company* used a device known as a "box-car loader" to facilitate the work of loading coal in box cars. The device was set upon a flat car, which was operated upon a track eight feet between rails and was about ten feet in width. It was propelled along its track by electric power and was driven by a motorman. It was housed near the south end of the coal dock, and traveled back and forth on the dock as there was occasion to use it while box cars were being loaded on the dock. It could not be operated along its track when there were cars on track No. 1, as the east rail of track No. 1 was used as the east rail of the loader. There was a clearance of from five to eight inches between box cars standing on track No. 2 and the box-car loader, and a clearance of about three and three-fourths inches between such loader and the engine in use at the time of the accident, which engine was the one customarily used in switching upon the coal dock. Track No. 2 curved to the west as it approached the house in which the box-car loader was stored when not in use, so that at this point there was a clearance of about fifteen feet between the loader and an engine.

Frank E. Fitzpatrick, the deceased, was foreman of the switching crew. On the morning of the accident the engine switched some empty cars onto track No. 2 for the purpose of being loaded. After the cars were spotted the engine was uncoupled and started to leave the dock, proceeding southward. The deceased took a position on the first or second step leading into the cab of the engine and held himself in position by grasping the handrail, his body being outside of the tender. The box-car loader, proceeding in a northerly direction, passed by the engine, and deceased was crushed to death between the two.

The plaintiff, as administrator, brings this action against the *Terminal Company* and also against the *Fuel Company*. The alleged negligence of the *Terminal Company* consisted in the failure of the fireman on the locomotive to keep a lookout ahead and to notify Fitzpatrick of his danger. At the close of the plaintiff's evidence a nonsuit was granted in favor of the *Terminal Company*. The jury returned a verdict on the case made against the *Fuel Company*, in which it found that such company was guilty of negligence in the operation of the box-car loader, by failing to keep a proper lookout and by not having a danger signal warning on such loader, and that such negligence was the proximate cause of the death of Fitzpatrick.

By its answer to the fourth question in the special verdict the jury found that the deceased was guilty of a want of ordinary care that contributed to produce his death. The sixth question in the special verdict was as follows:

"Was it the practice and customary way of doing the work for the car loader to move upon its track opposite to or past the engine or cars when the engine was putting in or taking out cars, or otherwise moving on track No. 2?"

To which question the jury answered "No." The plaintiff moved to change the answer of the jury to the fourth question in the special verdict, and also asked that the verdict be amended by finding that the *Fuel Company* was negligent in running the box-car loader down the track before the engine had passed out from the dock. These motions were denied, as well as a motion to set aside the verdict and grant a new trial, and judgment was entered upon the verdict in favor of the defendant *Fuel Company* dismissing the complaint. From the judgment entered as to each of the defendants, plaintiff brings this appeal.

For the appellant there was a brief by *Crownhart & Foley*, and oral argument by *C. H. Crownhart*.

For the respondent *Lake Superior Terminal and Transfer Railway Company* there was a brief by *J. A. Murphy*; for

the respondent *Northwestern Fuel Company* there was a brief by *Luse, Powell & Luse,* attorneys, and *A. E. Boyeson* and *P. J. McLaughlin,* of counsel; and the cause was argued orally by *L. K. Luse.*

BARNES, J. That the question of the negligence of the *Terminal Company* should not have been submitted to the jury is not free from doubt. The testimony tending to show such negligence was given by the locomotive fireman and pertained to his own duties and to his manner of performing them. The evidence when the nonsuit was granted was materially different on many important points from that thereafter offered by the *Fuel Company.* From such evidence it appeared that, at the time the engine was uncoupled and started southward, the box-car loader was standing on its track near the house in which it was stored and at a place where the switch engine would clear it by some twelve or fourteen feet, and that it was not the practice or custom of those operating the loader to attempt to move it along its track while the engine was moving on track No. 2. There was evidence which would warrant the jury in finding that the distance between the box-car loader and the engine, at the time the latter started to pull out, was anywhere from 145 to 375 feet. The evidence is not entirely harmonious as to the rate of speed at which the engine and car loader were traveling before they passed each other, but it would indicate that the maximum speed of either did not exceed four miles per hour, and the evidence further indicates that the time which elapsed between the starting of the engine and the happening of the accident was from thirty to sixty seconds. The appellant contends that the fireman was negligent in failing to keep a lookout and in failing to warn the deceased of his danger in time to avoid it. The fireman testified that it was his duty to take signals when the engineer could not, to ring the bell, to tend fires, to keep up his engine, to fill the oil cans and to keep a lookout on the track for danger, and to warn

the engineer and other members of the crew of danger. In reference to this particular accident he testified that, before giving the engineer the signal from the switching crew to start up, he looked ahead and ascertained that the loader was standing on its track near its house in the clear and in the same position in which it was when the crew came in to do its work; that he then looked back to see if the switching crew, who were supposed to ride out on the footboard of the tender, were safe; and that it was not more than a minute after the engine started when the accident happened. He further said it was part of his duty to look back and see if the men got on the tender; that he was looking back when the accident happened; and that it occurred so suddenly that he did not have time to look back and then again to the front.

Were the fireman charged with the duty of looking at all times and under all circumstances in the direction in which the engine was going, it would be difficult to escape the conclusion that he was negligent in the present case. But he had other duties to perform which necessarily prevented him from looking ahead at all times, and it is a fair construction of his evidence to say that he was charged with the duty of keeping a lookout after the engine started when not necessarily employed otherwise. The engine had not gone the distance he could plainly observe from where it had been standing before the accident happened. He did look to ascertain that the track was clear before giving the signal to start. It was apparently his duty also to see that the switchmen were safely located on the footboard of the tender. The only ground on which the fireman could be held negligent was that he looked back longer than was necessary and this does not affirmatively appear. It may be that he might have performed this part of his duty with greater celerity than he did, but from the evidence as it stood when the nonsuit was granted he had no reason to anticipate that the car loader would change its position until after the engine pulled out, and he had ascertained that the track was clear before giving

the engineer the signal to go forward. It has been held by this court that "a conclusion of a trial court, respecting sufficiency of evidence as to any fact in issue to present a jury question, should not be disturbed unless it appears from the record to be clearly wrong, giving due weight to the superior advantages which such court had for discovering the truth." *Clemons v. C., St. P., M. & O. R. Co.* 137 Wis. 387, 391, 119 N. W. 102; *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Bohn v. Racine,* 119 Wis. 341, 96 N. W. 813; *Lam Yee v. State,* 132 Wis. 527, 112 N. W. 425. In the face of this rule this court would not be warranted in reversing the ruling made by the trial court in granting the nonsuit. On the contrary, we think the ruling was correct.

The evidence was ample to warrant the jury in finding that the deceased was guilty of contributory negligence, and calls for no discussion. It is urged, however, that, if the deceased was negligent, his negligence consisted in his failure to look out for the loader, and that by the answer to the sixth question in the special verdict he was exculpated from blame in this regard, and that the plaintiff, therefore, was entitled to have the answer to the fourth question in the special verdict finding contributory negligence changed, and to have judgment in his favor on the verdict as so modified. Failing in this, it is urged that the answers to the fourth and sixth questions in the verdict are so inconsistent that it should have been set aside and a new trial granted.

In passing upon this aspect of the case the evidence most favorable to the defendant *Fuel Company* must be considered. From that evidence the jury might have concluded that it was the uniform practice of the switching crew to ride on the footboard in front or on the rear of the engine when it was about to leave the dock; that the deceased chose not only a dangerous but an unusual place to ride; that the box-car loader frequently moved past the engine while the same was standing on coal dock track No. 2; that the car loader started out every morning in winter at 8 o'clock for its day's work.

and moved past any engine or cars that were at a standstill on track No. 2; that the car loader pulled out at its usual time on the morning of the accident; that it started before the engine did, and that it was brought to a full stop before the engine passed by it; that the deceased had worked with the switching crew on this dock for a year and was thoroughly familiar with the manner in which the box-car loader was handled, and, knowing that it was likely to start out at the time it did, and without looking to ascertain where the loader was or whether it was in motion, he took a position that was certain to result in his death if the loader was moving in the direction of the engine. That he did not look is very evident, else he would have avoided the peril by stepping into the cab. We do not construe the sixth question and answer as finding that the loader did not customarily pass the switch engine and cars on track No. 2 when the same were not in motion. The jury did not find that the *Fuel Company* was negligent in moving the loader past the engine on track No. 2, but because it was not equipped with a danger signal and because the operator was not keeping a proper lookout. We fail to see where there is any inconsistency in the answers made by the jury to the fourth and sixth questions of the special verdict. There appears to have been sufficient evidence to sustain the answers made to both of the questions.

By the Court.—Judgment affirmed.

STATE, Respondent, vs. MCALOON, Appellant.

February 2—February 22, 1910.

Criminal law: "Wilful" acts: Town orders: Unauthorized issuance: Penalty: Civil action.

1. The word "wilful" in the criminal law involves evil intent or legal malice.
2. A civil action will lie to recover the forfeiture imposed by sec. 823, Stats. (1898), upon an officer issuing a town order without authority of the town board, at least if his act was not wilful.

[3. Whether sec. 4550, Stats. (1898), makes the wilful issuance of an unauthorized town order a misdemeanor, not determined.]

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *C. R. Fridley.*

For the respondent there was a brief by *William R. Foley,* district attorney, and *Russell Jackson,* deputy attorney general, of counsel, and oral argument by *Mr. Jackson.*

WINSLOW, C. J. This is a civil action by the state to recover the penalty denounced by sec. 823, Stats. (1898), against any chairman of a town board who issues a town order without authority of the town board. Upon general demurrer the claim is made by defendant that no civil action will lie for such penalty, but only a criminal action.

The argument of the demurrant runs thus: By sec. 3294, Stats. (1898), forfeitures may be sued for and recovered in a civil action, provided the act for which the forfeiture is imposed be not also a misdemeanor, and, further, an act punishable by fine or imprisonment is a misdemeanor; by sec. 4550, Id., any town officer who wilfully violates any provision of law authorizing or requiring anything to be done or prohibiting anything from being done in his official capacity is to be punished by imprisonment not exceeding one year or

by fine not exceeding $500: therefore the issuing of a town order without authority of the town board is a misdemeanor and cannot be recovered by civil action. This argument overlooks entirely the fact that the last-named section only punishes criminally the "wilful" violation of duty. In the criminal law "wilful" involves evil intent or legal malice. *Brown v. State,* 137 Wis. 543, 119 N. W. 338.

The forfeiture named in sec. 823, *supra,* is imposed upon an officer who issues a town order without legal authority, regardless of the fact whether the act be wilful, and the complaint does not charge the act to have been wilful in this case. Hence conceding, but not deciding, that sec. 4550 makes the wilful issuance of a town order a misdemeanor, it still does not apply to the act charged in this case, and therefore that act is not a misdemeanor, and a civil action will lie to recover the forfeiture.

By the Court.—Order affirmed.

LAFFITTE, Appellant, vs. CITY OF SUPERIOR, Respondent.

February 3—February 22, 1910.

Tax titles: Limitation of actions: Possession after recording of tax deed: Landlord and tenant: Equity: Quieting title to land: Refunding taxes paid by claimant.

1. In respect to occupied property affected by a tax deed, the statute of limitations acts like a two-edged sword. It cuts both ways, operating in favor of the possessor "to bar the title of whichever party—the original owner, or the tax-title claimant—was, during the three years next after the recording of the tax deed, under the necessity of resorting to legal proceedings to obtain possession."
2. The nature of possession necessary to set the statute of limitations running either way, in respect to a tax deed, is the same as required to constitute adverse possession by a person claiming title founded upon a written instrument.

3. The rule last above does not require the possession to have all the characteristics mentioned in sec. 4212, Stats. (1898), but there must be that complete dominion over the property, appropriate to ownership of such property similarly situated, by acts sufficiently significant and continuous to reasonably inform the adversary, if he pays reasonable attention to his affairs, that his right is defied.
4. Merely exercising some rights of ownership by one of two adversaries, the other not being in fact dispossessed so as to render the possession of that one not only hostile and notorious but exclusive, is not sufficient.
5. Merely surreptitiously obtaining recognition by a tax-deed claimant as landlord, from a tenant of the former owner who continues in possession under such circumstances as to reasonably induce such owner to rely upon the former relations of landlord and tenant continuing, does not work any change of possession so as to turn the statute of limitations from running against the tax deed to running in its favor.
6. Taking actual possession of a portion of one lot in an inclosed platted block, under a tax deed covering the entire block, leaving another portion of the block in actual possession of the former owner by his tenant, residing thereon, and doing no act as to the balance of the block but surreptitiously obtaining from the tenant recognition as landlord, the former owner appropriating and using the balance of the block, as before—does not change the running of the statute of limitations so as to favor the tax-deed title, except as to that part of the land actually occupied by the invader.
7. After the status shall have been fixed, as before stated, of actual occupancy of part of the inclosed block by the invader and such occupancy of part by the tenant of the former owner, whether acts of ownership by such owner, occurring as to the balance of the block, are unknown to the tax-title claimant, is immaterial, so long as they are open and notorious.
8. A tax-deed claimant having induced the former owner's tenant in possession to take from him a lease of the property, the ostensible lessees continuing in possession as before without any apparent change of attitude toward the former owner, evidence of a declaration by the tenant to such owner denying any relations with such claimant recognizing him as landlord, is competent on the question of knowledge of such owner of attornment by such tenant to such claimant.
9. When a statute of limitations shall have fully run against a right, the same is extinguished and a new right created of equal dignity with the one destroyed, as regards constitutional protection.

10. When the right of a tax-title claimant shall have been extinguished by the statute of limitations, a right is created in favor of the real owner to have the cloud upon the title created by the record of the tax deed, and of any subsequent deed referable thereto, removed and, incidentally thereto, a right exists to an appropriate remedy in that regard, unburdened by any equity in favor of the one whose rights have ceased to exist to refund taxes paid or to compensate for tax liens acquired by him.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Action to quiet title. The pleadings were in the usual form presenting the question of whether the claimants of the land in controversy, as possessors of the patent title, had been in possession of such land during the three years succeeding the execution of the tax deed, under which defendant claimed, so as to extinguish by force of sec. 1188, Stats. (1898), the latter title, or defendant took possession of the premises under the tax-deed title and held the same adversely to the original owner during the three years succeeding the recording of such deed so as to, under such section and sec. 1187, extinguish the original title.

The following facts were undisputed and found accordingly: The holder of the original title did not pay the tax assessed on the property after 1891. In due form taxes were levied thereon each year and returned delinquent. In 1905, by tax deeds, fair on their face, based on a sale of the property for delinquent taxes, the property was conveyed to Douglas county, and February 17, 1906, the tax title, by a deed in due form, was conveyed to the defendant. The property consisted of ten lots in the platted portion of Superior city, Douglas county, Wisconsin, known as block 69. On lots 1 and 10, forming the westerly side of the block, there was a dwelling house and a barn which existed during all the period herein mentioned and for a long time prior thereto. The block was inclosed by a fence. In 1902, the plaintiff and another, who then represented the original title, leased lots 1 and 10 and the buildings

thereon to one McCloud who resided thereafter thereon, as a tenant, till the time of the trial. He agreed to pay rent at the rate of $2.50 per month and paid some thereof at irregular intervals. Some time after he took possession and before the date of the tax deed, the tenant, at the request of the landlords, repaired the fence making it a substantial inclosure of the block. In February, 1907, defendant took down the fence at the rear of lot 5 sufficiently to enable it to move a building onto the back part of such lot, the building being placed thereon for the purpose of taking possession of the entire block under the tax-deed title. Defendant used the building for election purposes twice each year thereafter but did no other acts of ownership on the block except, in March, 1907, it procured McCloud to sign a lease, he, in form, thereby becoming its tenant of lots 1 and 10 at a monthly rental of $3. Plaintiff acted in concert with another, they together representing the original title to the whole block. During all the time of dealing with McCloud as tenant under the holder or rightful representatives of the original title, the actor in the matter was plaintiff's associate. Plaintiff became possessed of the entire original title subject to the tax title before the commencement of this action. He and his associate knew of the delinquent taxes, the execution of the tax deed, the placing of the building on lot 5, and claim of defendant under the tax deed, substantially as the events occurred, but there is no direct evidence that they knew of the claimed relations of landlord and tenant between McCloud and defendant.

The court found these additional facts: Neither plaintiff nor his associate, representing the original title, collected or demanded any rent of McCloud after the building was placed on lot 5, or thereafter exercised any act of ownership over any part of the block, except some grass was cut under the direction of one of them but without defendant's knowledge that the cutting was under such direction. Defendant's officers had every reason to believe from the time the building

was placed on lot 5 till long after the tax deed was more than three years old, that the holder of the original title had, as the fact is, abandoned the property. McCloud did not occupy any part of the block except the two lots covered by his lease, or do anything with reference to the same other than to repair the fence as aforesaid and to occasionally pasture his cow on the vacant lots. Defendant had actual possession of all of the block from the time it placed the building on lot 5 till the commencement of this action.

On the facts so found the court concluded that the original title was fully superseded by the tax title and the statute of limitations relied on by defendant and rendered judgment accordingly.

D. E. Roberts, for the appellant.

For the respondent there was a brief by *Thos. E. Lyons* and *T. L. M'Intosh,* and oral argument by *Mr. M'Intosh.*

MARSHALL, J. It seems to be conceded, as the fact is, that unless respondent under its tax-deed title, within the three years after the recording of such deed, took adverse possession of that part of the block in question not occupied by its building, and held such possession until the termination of such period, then as to that portion, not so adversely possessed, the statute of limitations ran in favor of the original title extinguishing the tax title, leaving only the deed, as to the latter, a cloud on the record as to the former title, rendering it competent for plaintiff to maintain an action to remove such cloud. The law is well settled as to that.

The statute of limitations acts both ways. In case of occupied lots it extinguishes the tax title of the claimant thereunder, who does not assert his right by excluding the original owner or commencing an action to obtain possession within the three years, and it extinguishes the right of the former owner if the tax-title claimant becomes adversely possessed of the land within the three years and such owner fails to assert his right by regaining possession or commencing an

action therefor within such period. *Edgerton v. Bird,* 6 Wis. 527, and note; *Knox v. Cleveland,* 13 Wis. 245; *Parish v. Eager,* 15 Wis. 532; *Lindsay v. Fay,* 25 Wis. 460. The gist of the decisions of this court on this subject is concisely stated in an extensive note to *Edgerton v. Bird, supra,* in these words:

"This statute, like a two-edged sword, cut both ways, and operated in favor of the possessor to bar the title of whichever party—the original owner, or the tax-title claimant—was, during the three years next after the *recording of the tax deed,* under the necessity of resorting to legal proceedings to obtain actual possession."

The nature of the possession necessary to set the statute running against the tax deed is definitely laid down by sec. 1190, Stats. (1898), as follows:

"What shall constitute a possession of lands within the meaning of the preceding sections and the extent of such possession shall be governed by the rules prescribed for determining an adverse possession by a person claiming title founded upon a written instrument."

That does not mean that the possession must have all the characteristics mentioned in sec. 4212, Stats. (1898). There may be such possession without such characteristics. There must be actual dominion over the premises by acts appropriate to ownership of property of such character similarly situated; acts of a tangible nature appropriate to challenge the attention of any adversary that he has been wholly excluded from possession. *Finn v. Wis. River L. Co.* 72 Wis. 546, 40 N. W. 209; *Ill. S. Co. v. Bilot,* 109 Wis. 418, 445, 84 N. W. 855, 85 N. W. 402. Of course mere occasional intrusions not reasonably calculated to attract attention, are not sufficient, but acts sufficiently continuous to reasonably attract such attention of one whose right is defied, if he pays ordinary heed to his affairs, is sufficient whether his attention is attracted to the real situation in fact or not. *St. Croix L. & L. Co. v. Ritchie,* 78 Wis. 492, 496, 47 N. W. 657.

Thus it will be seen that, in order for a tax-title claimant to set the statute of limitations running in his favor, he must take exclusive possession and hold it, exclusively and notoriously, so as to reasonably afford notice to the former owner of the adversary condition. To merely exercise some acts of ownership, the former owner not being in fact dispossessed but also exercising some such acts, is not sufficient any more in case of an adverse holding under a tax deed than under any other. That was declared in the early case of *Jones v. Collins,* 16 Wis. 594. In that case there were conflicting acts of possession and they were held not sufficient to warrant a finding of exclusive possession by the tax-title claimant so as to satisfy the statute, the court saying:

"The whole evidence shows that there was a constant squabble and contest in respect to the possession, between those acting on behalf of the estate of Jones and those claiming under the tax deeds. We shall not enter upon any discussion of the testimony upon the question of possession, and shall content ourselves with stating the conclusion we deduce from it. And to our minds it fails to show that those claiming title under the tax deed so dispossessed or disturbed the possession of the estate of Jones in the premises as to lay the foundation of the three years' limitation under the statute. . . . It cannot be said there has been any adverse possession under the tax deeds to the exclusion of the true owner. And to entitle a party to the protection of the statute when he claims to have been in the *actual possession* under a tax deed, he ought to show that his possession is open and exclusive. Otherwise we think no foundation is laid for the adverse possession contemplated by the statute."

There is another principle firmly established as to this class of cases. It is this: Where there is a tax deed upon land occupied by the former owner represented by a tenant, the tax-title claimant cannot obtain possession adverse to such owner by surreptitiously securing for himself recognition as landlord and collusively maintaining with such tenant such relations while the tenant, at the same time, apparently to the true owner, makes no sign of any change in

the former relations. That is plainly the effect of *Pulford v. Whicher,* 76 Wis. 555, 45 N. W. 418, and *Pulford v. Whicher,* 87 Wis. 576, 58 N. W. 1104.

Now neither the findings nor the evidence indicates that the respondent did anything but place the old building on the rear end of a corner lot of block 69 and obtain the signature of the tenant to a lease of the two lots occupied as aforesaid for a long time, whereby such two lots were in form leased by respondent to such tenant at $3 per month. There is nothing in the finding to indicate that plaintiff knew of the latter circumstance before this action was commenced, and nothing to show that there was any act by the tenant other than the signing of the lease, suggesting that he had turned to respondent as landlord. There is no finding that he ever paid to respondent any part of the stipulated rental, nor that the latter ever did any act in or about or concerning the buildings, by way of repairing or insuring the same or otherwise, as is usual and natural for a landlord to do. The evidence is as silent in respect to the matter as the findings, from which the inference is very strong that no such act occurred. The only circumstance, openly challenging appellant's position, was placing the old building, as indicated, which was left vacant, except for a day at each spring election and a day at each fall election, in case of there being any. In the meantime, as we read the record, the relations between the tenant and appellant and his associate Foltz, representing the patent title, did not change from what they were before the origin of respondent's claim. The case shows quite clearly that the tenant was maintained on the premises by the owners under the original title for the purpose of possession. The rent was nominal and was paid or not at the tenant's convenience.

The latter, doubtless, was willing to face both ways so long as by so doing he could thereby secure free use of the property. One side was lenient with him by not making any pressing demands, thereby promoting ostensible loyalty to

them, while the other was still more lenient by not making any demand for rent at all, thereby securing sufficient loyalty in its direction to prevent the tenant from disclosing to appellant or his associate Foltz its claim to be the true landlord.

Under the circumstances stated, it seems very plain that there were no relations between the tenant and respondent which affected the possession of the former owners. So far as the finding of the court was grounded on the claimed relations of landlord and tenant between respondent and McCloud, either that from and after the building was placed on lot 5 the former owner abandoned the block to the tax-title claimant, or that such claimant, from the time of such placing and the signing of the written lease by McCloud, was in the actual exclusive possession of the block, it cannot be approved.

The finding is to the effect that one season the grass on the block was cut under the direction of the former owner, but that such circumstance was immaterial because respondent had no knowledge at the time of the cutting or thereafter that it was under such direction.

The conceded circumstance of cutting the grass was not given proper significance. It is immaterial whether the respondent knew that it happened by the authority of the former owners or not. If the cutting of grass was open and in all respects consistent with the claim of ownership and such circumstance alone or in connection with others was reasonably sufficient to indicate to any one concerned, if he was paying the ordinary attention to the property, of an owner, that possession was claimed by appellant and his associate, adverse to the tax title, that was sufficient to charge respondent with the true situation whether he had actual knowledge thereof or not.

It seems that the finding limiting the acts of ownership, adverse to the tax title, to the one circumstance of cutting grass, is contrary to the clear preponderance, if not the un-

disputed evidence. Foltz testified that the grass was cut by him, or for him, every year but one, and that the tenant cut it the one year by his direction. That evidence seems to be rather corroborated by the other evidence in the record, than disputed. On the whole, it is to the effect that the entire block, except that part occupied by the tenant, up to the sides of the old building on lot 5, was used for the appropriate purpose of pasturage or raising grass, and that all acts in respect thereto were done without objection by respondent.

The further finding that the former owner did not demand nor receive any rent from the tenant after the building was placed on lot 5, seems to be wrong. The undisputed evidence is that rent was paid within the three years before the commencement of the action. True, the evidence suggests that the payments left the tenant still indebted, somewhat, for the period before the origin of respondent's claim, but it is quite plain that whatever was paid was on account, as if the tenancy was continuous, McCloud, up to the last, holding himself out to the former owners as their tenant, and actually denying to them that he had recognized respondent's claim in any way. The evidence in that regard was stricken out on motion and due exception was taken. We consider it was competent on the question of notice of any adverse relation between McCloud and respondent. The circumstance that very little rent was collected of McCloud was explained by Foltz. He testified, in effect, that the revenue feature was considered of little consequence; that McCloud was permitted to live on the property to maintain possession and take care of the property.

The learned circuit judge may have been influenced to a considerable extent in making the finding that the former owners abandoned the property to respondent from and continuously after the origin of its claim, from the fact that they did not pay any taxes thereon. That circumstance is given much significance in the finding. It seems that it was entitled to little or no weight since the action of the owners,

as regards the taxes, was no different after the recording of the tax deed than it had been for many years before. It seems very certain from the amount of the taxes, and other circumstances, that the owners omitted to pay them, thinking they were unenforceable because of illegality.

On the whole, we are unable to discover that there was any substantial change in the actual possession of the property by those representing the patent title, after the execution of the tax deed and before the commencement of this action, from what it had been for more than ten years before, except as to that part of lot 5 upon which respondent placed its building. It never had exclusive, if any, possession of any other portion of the block. The fact that the block was an entirety, so far as the inclosure was concerned, did not render the breaking of the fence and placing of the building on lot 5 a taking possession of the whole block, since the owner had a tenant on another portion of the block for the purpose of maintaining possession of the whole. Furthermore, if the act of moving the building onto the lot was for the purpose of taking possession of the whole block, it was ineffectual, since the tenant's possession of the balance of the block was not changed but continued, as before, down to the commencement of the action.

Notwithstanding the foregoing, respondent claims that appellant should not have the benefit of equity jurisdiction to remove the cloud upon its title created by the tax deed and deed based thereon to the respondent, except upon terms of paying the back taxes on the block, relying on sec. 1210, Stats. (1898). That relates to actions to set aside tax proceedings or certificates or deeds based thereon. This is not such an action. The theory of this action is that there is no tax deed; that the once tax-deed title has been extinguished by the statute of limitations; that all appellant needs the use of equity jurisdiction for, is merely to remove a cloud upon the title which is perfect in fact. Under our system the statute of limitations does not act merely on the remedy. It

extinguishes the right on one side and creates a right on the other which is of as high dignity as regards judicial remedies as any other; a right entitled to constitutional protection. *Eingartner v. Ill. S. Co.* 103 Wis. 373, 79 N. W. 433; *Pereles v. Leiser,* 119 Wis. 347, 96 N. W. 799; *State v. C. & N. W. R. Co.* 132 Wis. 345, 362, 112 N. W. 415.

This court, in the *Eingartner Case,* indorsed the rule in *Board of Education v. Blodgett,* 155 Ill. 441, 40 N. E. 1025, as a necessary result of the doctrine that the statute of limitations acts upon the right, not merely upon the remedy. It was thus stated in our own language:

"When the statute of limitations has run . . . the bar of the statute is a vested right . . . and that rule applies whether the limitation affects real or personal property, . . . ; the right to a defense, when fully vested, is as valuable as a right of action and is equally subject to constitutional protection."

When one has an absolute right, as to have his title to realty quieted and clouds thereon removed, and he has no legal, or only an inadequate legal remedy with which to conserve such right, he has a right to an equitable remedy in that regard.

The foregoing principles rule in the negative the proposition as to whether appellant should be required to pay the back taxes on the land as a condition of allowing the relief sought.

By the Court.—The judgment is reversed, and the cause remanded for judgment in appellant's favor according to the prayer of the complaint.

THIEN, Respondent, vs. BRAND, imp., Appellant.

February 3—February 22, 1910.

Mechanics' liens: Waiver: Giving credit: Setoff: Counterclaim: Appeal: Harmless error.

1. The giving of credit, by one entitled to a mechanic's lien, for a reasonable time but not to a definite date beyond the period fixed by law for commencing the lien action, does not *per se* waive the lien.
2. In an action to foreclose a mechanic's lien defendant may set off a demand for the amount of plaintiff's board furnished him in the course of the work.
3. The error, if any, in striking out a counterclaim for such demand was not prejudicial where plaintiff recovered only the value of his services over and above the board so furnished, so that the defendant had the full benefit of his demand by way of defense.

APPEAL from a judgment of the circuit court for Washburn county: A. J. VINJE, Circuit Judge. *Affirmed.*

Action to foreclose mechanic's lien. Plaintiff, who was a mill expert, claimed compensation for services in preparing plans for the erection and equipment of a certain mill of the defendant, and also for services as an expert in installing such mill machinery. The defense, as developed by the evidence, so far as material to the contentions upon this appeal, was a denial of any understanding or contract that plaintiff should be paid by defendant for such services; also dispute upon the amount to which he was entitled. Numerous so-called counterclaims were pleaded, but are not material to the present statement of facts. The court found that plaintiff was employed under such circumstances that he was entitled to *quantum meruit* for his services, which amounted to $460, and accordingly rendered judgment for that amount, less the defendant's taxable costs offset against it. From that judgment the defendant appeals.

A. L. Bugbee, for the appellant.

Otto Dorner, for the respondent.

DODGE, J. The principal controversy is over the question whether plaintiff performed his services under an understanding that he was to receive no compensation therefor other than his board and the commissions which he might receive from the sellers upon the machinery furnished for the mill. Also as to the value of those services. Upon these subjects the evidence is confused and, to say the most for the defendant, is conflicting. We are unable to say that there is any clear preponderance thereof adverse to the findings made by the trial court.

Another controverted question, not put in issue by the pleadings, was whether the plaintiff gave credit for such services to a date beyond the time when a mechanic's lien could be asserted under statute, it being contended that by doing so he waived his lien. The question of law thus raised we shall not deem it necessary to investigate or decide, for we have reached the conclusion that the evidence, though very much in conflict, is so ambiguous and so susceptible of different constructions and inferences that the decision of the trial court that the extension of credit was only for a reasonable time, and not to a definite date later than the period fixed by law for commencing the lien action, is supported by the evidence, and certainly is not in antagonism to any clear preponderance thereof. Such credit would not *per se* waive the lien. *Bailey v. Hull,* 11 Wis. 289.

One separate assignment of error is argued for that the court, upon motion, probably in the nature of demurrer *ore tenus,* struck out a counterclaim for the amount of plaintiff's board furnished him in the course of the work. We find it difficult to understand the theory upon which this was struck out. Defendant might not be able to recover a judgment therefor, yet, if proved, he would certainly be entitled to present the demand as a setoff. *Schumacher v. Seeger,* 65 Wis. 394, 27 N. W. 30; *West Allis L. Co. v. Wiesenthal,* 141 Wis. 460, 124 N. W. 498. However, we think no prejudicial effect can be ascribed to the error, if any, in striking

out the pleading, for defendant himself testified to such an understanding that there would be no liability to pay for such board, but that at most the value thereof should go in compensation for his work. The finding as to the value of plaintiff's services in light of the evidence clearly refers to the value of those services over and above his living expenses while in attendance at the place where the mill was constructed. The defendant has therefore received the benefit of the value of that board by way of defense as fully as if he had been permitted to assert it in the form of either counterclaim or setoff.

By the Court.—Judgment affirmed.

FORSETH, Respondent, vs. IRON RIVER LUMBER COMPANY, imp., Appellant.

February 3—February 22, 1910.

Master and servant: Personal injury: Unsafe working place: Unlighted timber chute: Assumption of risk: Contributory negligence: Evidence: Photographs: Excessive damages.

1. Evidence showing that a timberman working at night on a rollway at the foot of a chute in a sawmill could avoid being struck by timbers coming down the chute only by stepping quickly to one side; that in the absence of a light over the chute he could see freshly sawed, light-colored timbers in time to avoid them, but could not see dark-colored ones; that during his employment only light-colored timbers had come down the chute, and he had a right to expect that none others would come; and that he was struck and injured by a dark boom stick which, although keeping a lookout, he could not see in time to avoid it—warranted a finding by the jury to the effect that the employer's omission to maintain a light over the chute rendered the place dangerous and constituted actionable negligence.
2. Under the circumstances stated, the risk of being injured by a dark boom stick coming down the chute could not be said to be an open and obvious one which the timberman assumed as incident to his duties; nor was he guilty of contributory negligence as a matter of law.

3. Testimony of a witness in such case that boom sticks had not come through the mill that season, and that they were "pretty hard to see," was relevant and was properly admitted.
4. Photographs which were shown to give a correct view and representation of the place where plaintiff was working at the time of the accident were properly admitted in evidence.
5. An award of $3,150 for injuries consisting in the breaking of both bones of the leg above the ankle and resulting in a permanent deformity and impairment of the use of the foot, is *held* not excessive.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

This is an action to recover damages for injuries received by the plaintiff while he was employed by the defendant and which are alleged to have been due to the negligence of the defendant. The action was originally against the Edward Hines Lumber Company and the *Iron River Lumber Company,* but was dismissed as to the Edward Hines Lumber Company. The *Iron River Lumber Company* is engaged in a general sawmill business at Iron River, Wisconsin. On the north side of their sawmill is a conveyor for carrying to the sawmill yard the long and heavy timbers which have been sawed at the mill. After being sawed the timbers are pushed onto a horizontal rollway, about sixty feet long and two feet wide, made of heavy timbers. On the bottom of it are rollers, parallel and alternately live and dead; the live rollers being connected with and operated by the machinery of the mill. At the end of this rollway is a sharp decline or chute about twenty feet long, built of heavy, smooth, and slippery timbers. The rollway and the chute have sides about two feet high for holding and guiding upon the rollway and chute the timber which is run out upon the rollway and down the chute. Extending from the lower end of the chute, about twelve feet below the level of the rollway mentioned above, is a rollway about 275 feet long. Along the central portion of this rollway is a series of dead rollers, flanked by a low guard rail and extending about thirty feet from the

foot of the chute. Along both sides of the rollway, outside of the guard rails, are footwalks. Outside of each of the footwalks is a skidway onto which are rolled the timbers which come down the chute and onto the rollway. The rollway between the guard rails is also planked and is used as a floor for walking. When a timber had been carried out onto the upper rollway by the live rollers, until more than half of it projected over the chute, it dropped down the chute with great force and speed and was carried out onto the rollers on the lower rollway, sometimes going seventy-five feet or more from the foot of the chute along the rollway. After the timber slid onto the lower rollway, men with cant-hooks pushed it along the rollway to the desired position and then rolled it off onto the skidways. Ordinarily, two men, called timbermen, were employed in moving the timber along the rollway. One walked on each of the footwalks outside of the guard rails and they thus moved the timber along the rollway without stepping inside the guard rails. When a timberman worked alone, however, it was customary and necessary for him to stand between the guard rails. Having caught the back end of the timber with his cant-hook, he pushed it along the rollway to the desired position for rolling it off onto the skidways.

On April 8, 1908, the plaintiff was employed by the defendant to work as a timberman on the rollway. For four days he worked during the daytime. For three days of this time he and another timberman worked together, but on the fourth day he worked alone. After plaintiff had worked for four days on the day shift he was put on the night shift and worked alone as timberman for three nights and part of the fourth. When such timberman worked on the rollway alone it was necessary for him to watch the timbers as they were projected along the upper rollway and out over the chute to protect himself from injury by the timbers as they came down over the foot of the chute onto the lower rollway, because of the force and speed with which the timbers fell

down the chute and ran out onto the rollway. When he observed a timber projecting over the chute he stepped onto one of the footwalks outside of the guard rails and waited until the timber had come down. During the daylight the timberman could readily see the timber as it was projected over the chute, but during the nighttime it was necessary to have artificial light in order to perform his service.

The defendant had an electric lamp of sixteen candle power eight feet above the upper end of the chute, a light above the lower rollway twenty-three and one-half feet from the lower end of the chute, and others along the rollway at distances of forty feet. The plaintiff testified to the effect that he did not know that a light or lamp had theretofore been provided over the end of the chute; that it was not lighted during the nights he was there at work; that the fourth night of his work was a dark night, and that the nearest light to the end of the chute was the one twenty-three and one-half feet from the lower end of it, and that he was able to see the white, newly-cut timber as it was projected over the chute and thus protect himself and avoid injury by getting out of the way. After the plaintiff had been working for three or four hours on the fourth night, an old boomstick, a dark, discolored log, which had been run through the mill but not sawed, was projected out along the upper rollway and came down the chute. Plaintiff was pushing a timber along the rollway and, although he was watching for timber at the upper end of the chute, he testified that he did not see the boomstick until it had come partly down the chute and was so close to him that he was unable to avoid being struck by it. Both bones of his right leg were broken just above the ankle; he has suffered great pain, and is permanently injured, in that his leg is weak and his foot is permanently turned out, partially impairing the use of his foot and leg.

The jury in a special verdict found that there was not sufficient light in and about the place where the plaintiff was

working to enable him to see the boomstick coming down the chute; that the defendant was negligent in not furnishing more light, and that this was the proximate cause of the plaintiff's injuries; that the plaintiff was not guilty of any want of ordinary care contributing to his injuries; and that he had not assumed the risk and danger incident to the boomstick coming down the chute and injuring him. The damages were fixed at $3,150. This is an appeal from the judgment on the verdict as rendered.

Solon L. Perrin, for the appellant.

Victor Linley, for the respondent.

SIEBECKER, J. It is contended that there is no evidence to sustain the finding of the jury to the effect that the plaintiff's working place was not a reasonably safe one for want of sufficient light to enable him to see the dark timber coming down the chute. The jury found that this place was not sufficiently lighted to enable plaintiff to see the boomstick as it passed from the upper rollway down the chute and onto the lower rollway, and that the defendant was negligent in omitting to keep a lamp at the place over the chute to furnish the requisite light at this place. The contention is that the evidence fails to sustain the findings of facts embraced in the answers of the jury to the questions of the special verdict. It appears from the foregoing summary of the facts established by the evidence that the plaintiff in performing his service near the lower end of the chute was required to observe the sawed timber coming down the chute to avoid being struck as the timber slid out onto the lower rollway over the place he necessarily occupied in performing his duties. Under the circumstances shown it is manifest that the light provided on the occasion in question was sufficient for observing the freshly sawed, light-colored timbers. The evidence, however, tends to show that because of the dim light plaintiff could not see the dark boomstick as it entered and started down the chute. It also appears that he did not know, nor

was he informed, that such dark timbers were liable to come through the mill. The evidence is that no such dark timbers had come through the mill while he was working there as timberman. In the situation presented to him he was justified in believing and in relying on the fact that none but freshly sawed, light-colored timbers would come down the chute. Under such circumstances the jury were well justified in finding that the omission of the defendant to keep a lighted lamp in the place provided therefor over the chute made it well-nigh impossible for the timberman to observe the dark timber as it was projected over the chute. It is also shown that the timberman working on the rollway avoided the danger of injury from timbers coming down the chute by watching for them and quickly stepping to the side of the main line of rollers. It was therefore sufficiently shown that the dark timber made plaintiff's working place dangerous through defendant's omission to light the chute; that the plaintiff had no knowledge of the extra hazard from this boomstick; that he had not been apprised thereof; and that such conduct on defendant's part was the proximate cause of plaintiff's injuries. These facts and circumstances warranted the inference that the omission to keep a lighted lamp over the chute constituted actionable negligence.

It is claimed that the evidence shows that the plaintiff was fully informed of the way defendant conducted its business; that the peril and danger complained of were open and obvious; that the plaintiff must be held to have assumed them in undertaking the employment; and further, that his failure to observe the boomstick before it struck him amounts to contributory negligence as matter of law. We do not find that these claims can be sustained in the light of the evidence. The evidence fails to show that a timberman, looking out for freshly sawed timbers in the usual course of his duty, could see this dark-colored one, or that he could be apprised of its approach in any other way, before, as plaintiff testified, it was so close upon him that it was impossible for him to

escape injury from it. As stated, the facts in evidence tend to show that because he was unable to see it he was not aware of its approach, although he had kept a lookout. He also had a right to expect that nothing would come through the mill except the freshly sawed, light-colored timber. Under such circumstances it cannot be said that this danger was an open and obvious one which plaintiff assumed as incident to his duties. These facts also justified the inference that the defendant was free from contributory negligence.

It is contended that the damages are excessive. The injury consisted of a breaking of the bones above the ankle and a tearing of the ankle cords, which resulted in a permanent weakness of the joint and an abnormal turning out of the foot, permanently impairing the use of the foot in walking and leaving the plaintiff deformed. Under these circumstances we cannot say that the jury's award of damages is so excessive that we can disturb it.

We find no prejudice in the admission of the evidence of the witness Odegard. His statements concerning the fact that boomsticks had not come through the mill that season and that they were "pretty hard to see" were relevant to the issues litigated and were properly admitted.

There is evidence that the photographs give a correct view and representation of the place and structures where plaintiff was working at the time of the accident. They were therefore properly received.

There is no prejudicial error in the record.

By the Court.—Judgment affirmed.

WOLFE, Appellant, vs. FURMAN and another, Respondents.

February 3—February 22, 1910.

Costs: Replevin: Title to land.

In replevin for hay, an allegation in the complaint that the hay was cut from certain land, and a finding by the court that one A. was the owner of the land from which it was cut, do not show that the title to real property came in question so as to entitle plaintiff to costs on that ground upon a recovery of less than $50, where the pleadings did not put in issue the title to the land and the trial court found that it did not come in question.

APPEAL from a judgment of the circuit court for Washburn county: A. J. VINJE, Circuit Judge. *Affirmed.*

This was an action of replevin commenced in the circuit court for Douglas county, and afterwards removed to the circuit court for Washburn county, to recover the possession of a quantity of hay alleged to be owned by the plaintiff. The complaint alleges that the value of the hay is $150 and that the same had been wrongfully taken and detained by the defendants. The answer was in substance a general denial. The jury returned a special verdict finding the value of the hay cut and removed from the land in question to be $40. In addition to the finding of the jury the court made the following findings of fact on the issues raised by the pleadings and not covered by the verdict: That at all the times mentioned in the complaint one Frederic Ayer was the owner of the lands described in the complaint and that during all of said time I. W. Burhans was his agent; that on the 10th day of July, 1908, said I. W. Burhans, as agent of said Ayer, sold to the plaintiff and granted him a license in writing to cut and remove all the grass growing on the lands described in the complaint for that year; that during the month of August, 1908, defendants entered upon said lands and cut and

removed the hay in question without permission or authority, and mixed and confused the same with other hay grown upon defendants' lands, and stacked the same on the lands of one James Furman; that after said hay was cut and removed by defendants said I. W. Burhans, as agent of said Frederic Ayer, gave a further writing to the plaintiff purporting to sell and convey the hay cut from the lands described in the complaint, and assigning to him any and all right of action he may have against the defendants by reason of such unlawful cutting; that on the 20th day of November, 1908, by virtue of the writ of replevin issued herein, the sheriff of Washburn county seized and took possession of the hay described in the complaint, and still holds it subject to the order of this court; that defendants did not give bond for the release of said hay according to sec. 2888, Stats. (1898).

As conclusions of law the court found that at the time of the commencement of this action the plaintiff was the owner and entitled to the possession of the hay cut from said lands; that the defendants unlawfully cut and removed the same from said lands and mixed and confused it with other hay grown on the premises of one James Furman; that the plaintiff is entitled to judgment for the value in money of the hay as found by the jury, and that nothing should be allowed the defendants as compensation for their labor and services in cutting and removing said hay; that no question of title to real property was presented by the pleadings, and no such question arose on the proceedings or came in question at the trial; and that defendants are entitled to costs.

A dispute having arisen as to which party was entitled to costs, plaintiff moved the court for an order certifying that the question of title to real property arose and came in question at the trial, and allowing him costs in the action, which motion was denied and costs were allowed the defendants. Judgment was entered in favor of the plaintiff for the value of the hay as found by the jury, and for costs in favor of the

defendants, and directing that the plaintiff's damages be offset against the defendants' costs, and that they have judgment for the balance—$21.01; from which judgment this appeal was taken.

For the appellant there was a brief by *Catlin, Butler & Lyons,* and oral argument by *T. L. McIntosh.*

A. L. Bugbee, for the respondents.

KERWIN, J. The only question before us is one of costs. It is claimed by appellant that, although the value of the property recovered in the action was but $40, the title to land came in question, hence the plaintiff was entitled to costs. The court below found that the question of title to real property was not presented by the pleadings, nor did it arise on the proceedings or come in question at the trial, and that the defendant was entitled to costs. There is no bill of exceptions; therefore we need only inquire whether the judgment is warranted upon the findings. The defendant was entitled to costs upon the findings unless the title to real property was in question. Secs. 2918, 2920, Stats. (1898). The mere fact that the complaint alleged that the hay was cut from real property did not necessarily show that the title to land came in question, nor did the finding that one Ayer was the owner of the land from which it was cut. That the title to the land was admitted or not disputed is consistent with the findings and judgment. Appellant relies upon several decisions of this court which we will briefly consider. In *Lipsky v. Borgmann,* 52 Wis. 256, 9 N. W. 158, the title to land was put in issue by the pleadings and, as the court said in that case, made a proper case for recovery of costs. *Ames v. Meehan,* 63 Wis. 408, 23 N. W. 586, was an action brought in circuit court for the recovery of the value of timber alleged to have been wrongfully cut and removed from the plaintiff's land. Plaintiff recovered $38.75. In this case also the title to the land from which the timber was cut was put in issue by the

pleadings. In the case before us the pleadings did not put the title to any land in question. The title to the hay alleged to have been cut from certain land was in issue by the pleadings, but not the title to the land from which it was cut. *Maxim v. Wedge,* 69 Wis. 547, 35 N. W. 11, was an action for trespass to real estate in cutting trees thereon. The title was put in issue by the pleadings. The above cases relied upon by the appellant are distinguished from the case before us in this: that in the instant case the title to the land was not put in issue by the pleadings and there is nothing in the record to show that it came in question, and the court below found that it did not. The judgment below is right and must be affirmed.

By the Court.—The judgment is affirmed.

WATERMAN and another, Respondents, vs. LESAGE, Appellant.

February 3—February 22, 1910.

Landlord and tenant: Holding over: Renewal of lease: Presumption: New agreement: Evidence.

1. Where the tenant, after the expiration of a term fixed by a lease at one year or less, continues to occupy the leased premises without any new contract, the holding over may, at the option of the landlord, be considered a renewal of the prior lease for a like period and upon like terms.
2. The presumption of renewal of the lease in such case cannot be repudiated by proof of a contrary intention on the part of the tenant alone.
3. The parties in such a case may agree that the holding over shall be on different terms or for a different period; and such agreement may be proven like any other parol agreement.
4. A printed form on the back of rent receipts given to a tenant holding over, stating that the law requires tenants, when no lease has been signed, to give thirty days' notice before vacating, did not constitute a new contract.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

W. P. Crawford, for the appellant, cited *Zitske v. Grohn,* 128 Wis. 159, 107 N. W. 20; *Leggett v. Louisiana P. E. Co.* 134 Mo. App. 175, 114 S. W. 92; *Eimermann v. Nathan,* 116 Wis. 124, 92 N. W. 550; *Stott v. Chamberlain,* 21 S. Dak. 520, 114 N. W. 683; *Millis v. Ellis* (Minn.) 122 N. W. 1119.

For the respondents there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.* They cited, besides other cases, *Auer v. Hoffmann,* 132 Wis. 620, 112 N. W. 1090; *West Concord M. Co. v. Hosmer,* 129 Wis. 8, 107 N. W. 12.

TIMLIN, J. The trial court directed a verdict in favor of respondents for $60 rent due for the month of January, 1909, upon the following facts: On November 1, 1907, respondents leased to appellant by a written lease for the term of six months from that day the first floor and basement of a certain building at a rent of $60 per month payable on the first of each month in advance. Shortly prior to the expiration of this six months there was a conversation by telephone between the parties which is given by the appellant as follows, respondent speaking:

"'It's about time to make out a new lease; your lease will expire.' He says I got to come over and sign a new lease. I says, '*Mr. Waterman,* I won't sign any more lease.' I says, 'I will stay as long as I can; as long as I have to. I refuse to sign any more lease.' There was nothing more said. I quit talking to him right away."

The respondent's version is as follows:

"I asked him if he wanted a new lease for a year. He says, 'I am going to remain here—got a lease—hold over or renew that lease.' I told him it was satisfactory to me as long as I understood it that way. The sum and substance of that talk between us was on my part that I wished *LeSage* to enter into another written lease and he declined."

The appellant continued in possession after May 1, 1908, paying his rent monthly for the six months expiring November 1, 1908, also continued in the same way for the succeeding months of November and December, but vacated the premises during the last days of December and did not occupy them thereafter. On November 30th appellant served written notice upon the respondents that appellant would vacate and deliver up the premises at the expiration of one month from that day, namely, December 30, 1908. To this respondent made reply by letter to appellant dated December 12th acknowledging receipt of this notice and stating that he would hold the appellant to the terms of the lease until May, 1909; would not accept surrender of the premises before that date nor consent that the lease be terminated. In the interval between the first conversation over the telephone and the giving of the written notice mentioned there were several conversations between the parties; one in June in which appellant said he was going to build and expected to get out of the leased premises in the fall. Respondent answered that he had better wait until next year, and tried to discourage him, but said nothing about his being obliged to stay for a six-months period. The next conversation was later and concerned the purchase of a furnace which appellant had in the leased premises and respondents bought, but it was specially agreed that anything which was done in relation to the furnace should not affect respondents' claim for rent. The monthly receipts which respondents gave appellant for rent had printed on the back the following:

"The laws of Wisconsin require tenants renting houses or buildings, when no lease has been signed, to give the landlord thirty days' notice before vacating said property, and in case a tenant vacates without giving said notice and the premises remain vacant said tenant is liable for rent of said premises for thirty days after he vacates. I earnestly hope all my tenants will observe this law and give thirty days' notice before vacating. The observance of this law will avoid much misunderstanding and possibly hard feeling, as no one cares to pay rent for vacant property. L. E. WATERMAN."

In November, 1908, appellant learned that some one was looking for the building, found out who it was, and went to respondent and told him the school board was looking for that place and that if he could see Mr. Turnbull he might get him to take it, as long as appellant was going out. Respondent said he would do so. Appellant informed respondent that he intended to move into appellant's new building in November or December. At one of these conversations and in August or September the respondent said to the appellant: "You know you have a lease?" to which appellant answers: "No, I didn't have a lease, I canceled my lease." It further appeared that the respondents had on November 21, 1908, advertised these premises for rent, that they remained vacant during January, 1909, and that they were leased by respondents to some other party who moved in about February 1, 1909.

The appellant assigns error in the ruling of the court directing a verdict for the respondents for the January rent of the premises in question. Our statute (sec. 2187, Stats. 1898) provides that if a tenant for a year or more shall hold over after the expiration of his term he may, at the election of his landlord, be considered a tenant from year to year upon the terms of the original lease. This first appeared as a proviso to what is now sec. 2183, Stats. (1898). It does not include the instant case, because the appellant was not a tenant "for a year or more." In some states by statute such holding over creates a tenancy at will. *O'Brien v. Troxel*, 76 Iowa, 760, 40 N. W. 704; *German State Bank v. Herron*, 111 Iowa, 25, 82 N. W. 430. Aside from statutory provisions there is a diversity of judicial opinion regarding the effect of holding over. 1 Taylor, Landl. & T. (9th ed.) § 22. But the weight of judicial authority seems to be that, independent of statute, when the tenant, after the expiration of a term fixed by the lease at one year or less, continues to occupy the leased premises without any new contract, this may, at

the election of the landlord, be considered a renewal of the prior lease for a like period and upon like terms. 18 Am. & Eng. Ency. of Law (2d ed.) 405; *Wood v. Gordon,* 18 N. Y. Supp. 109; *Ketcham v. Ochs,* 34 Misc. 470, 70 N. Y. Supp. 268; 24 Cyc. 1017, 1018. This presumption cannot be rebutted by proof of a contrary intention on the part of the tenant alone. *Chicago v. Peck,* 98 Ill. App. 434; *Clinton W. C. Co. v. Gardner,* 99 Ill. 151; *Schuyler v. Smith,* 51 N. Y. 309. The matter rests in contract, however, and landlord and tenant may agree that the holding over shall be on different terms or for a different period. *Appleton W. W. Co. v. Appleton,* 132 Wis. 563, 113 N. W. 44; *Gilman v. Milwaukee,* 31 Wis. 563. This agreement may be proven like any other parol agreement. But the printed form on the back of the rent receipts could not alone constitute a new contract.

We are not able to find in the foregoing evidence anything to warrant an inference by the jury that a new contract was effected between the parties. The appellant apparently assumed that he had the right at his own will to continue in possession after the expiration of the written lease on terms dictated to the respondents by him but not assented to by the respondents. This, as we have seen, is not the law. The option lay with the respondents. Remaining in possession after having failed to obtain the respondents' consent to a modification of the terms of the written lease is all that is necessary to be established in such case in order to entitle the respondents to recover. No rent other than that for January, 1909, is involved in this action, and we express no opinion upon the right of the respondents to recover the rent for February, 1909, after they had put other tenants in possession. It follows that the judgment of the superior court must be affirmed.

By the Court.—Judgment affirmed.

BAILEY, Appellant, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Respondent.

February 3—February 22, 1910.

Railroads: Liability to laborers for contractors: Notice of claim: Upon whom served: Sufficiency.

1. A notice of claim, given pursuant to sec. 1815, Stats. (1898), for the purpose of making a railroad company directly liable for indebtedness of a contractor for labor performed in the construction of the railroad, is *held*, following *Matzewitz v. Wis. Cent. R. Co.* 140 Wis. 643, to have been served upon a proper employee of the company.
2. Where, in such case, the person who employed the claimant had no contract relations with the railroad company, but was either a foreman or a subcontractor of the principal contractor for the construction work, and the principal contractor had made payments directly to the claimant and other employees so that they might well have assumed that they were working directly for him, a notice, otherwise sufficient, in which the claimant stated that the amount owing him was due from such principal contractor, performed all the functions contemplated by the statute (sec. 1815, Stats. 1898), and was a substantial compliance therewith, even if the claimant's employer was in fact a subcontractor.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

The complaint in this action alleged that between the 8th and 29th days of August, 1907, the plaintiff performed work as a railroad laborer for H. F. Balch in constructing a portion of the defendant's line of road, upon which account said Balch became indebted to the plaintiff in the sum of $26.73, which amount became due and payable on the 20th day of September, 1907; that such indebtedness was not paid, and that within thirty days from the time same became due and payable plaintiff served a notice in writing upon the defendant railway company, as required by sec. 1815, Stats. (1898), in order to render the defendant herein liable on said ac-

count; and that suit was commenced within sixty days after the claim became due and payable and said notice was served. The answer was a general denial.

Plaintiff had judgment in the municipal court of Douglas county. An appeal was taken to the superior court of said county. At the close of the plaintiff's testimony the defendant moved for a nonsuit on the ground that the notice was not served upon the proper person, and that it did not comply with the statute in that it did not name the person who was indebted to the plaintiff. The motion was granted, and from judgment of nonsuit this appeal is taken.

For the appellant there was a brief by *Michael S. Bright* and *D. E. Roberts,* attorneys, and *Walter S. Whiton,* of counsel, and oral argument by *Mr. Roberts.*

For the respondent there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.*

BARNES, J. The appellant contends that the case at bar presents the identical questions that were passed upon and decided in *Matzewitz v. Wis. Cent. R. Co.* 140 Wis. 643, 123 N. W. 121, and that the judgment appealed from must be reversed if that case is followed. The respondent, on the contrary, argues that the judgment should be affirmed: (1) because the evidence showing the character of Gillis's employment by the railway company is different from that given on the trial in the *Matzewitz Case;* and (2) because the evidence in the present case conclusively shows that Philbrook employed the plaintiff in his character as a subcontractor of the principal contractor, Balch, and not as foreman for the latter, and that therefore the notice served on the defendant pursuant to the provisions of sec. 1815, Stats. (1898), was fatally defective in naming Balch as the contractor for whom the work was performed, instead of Philbrook.

1. Mr. Gillis was sworn as a witness in the *Matzewitz Case* and also in the case at bar. The only evidence offered

in either case in reference to his connection with the defendant railway company was given by himself. We are unable to discover any material difference between the testimony given by him on the two trials, and on the authority of the case already cited we must hold that the notice was served on a proper party.

2. The witness Parker testified positively and directly to a state of facts which would clearly indicate that Philbrook was a subcontractor of, rather than a foreman for, the principal contractor. The evidence of Philbrook is somewhat vague upon the point, but on the whole conveys the impression that he acted in the capacity of foreman. If this court were passing upon the question as an original proposition, it would have little difficulty in concluding, on the present state of the evidence, that Philbrook was a subcontractor. But we do not think the evidence is so clear that the question is not one that should be submitted to a jury, or that a verdict finding that Philbrook was a foreman could not be permitted to stand. But, assuming that Philbrook was a subcontractor, it does not follow that the notice was insufficient. This court held in *Mundt v. S. & F. du L. R. Co.* 31 Wis. 451, that sec. 1815, Stats. (1898), should be liberally construed in favor of the laborer for whose benefit it was passed. The obvious purpose of requiring notice to be served upon the railway company is to enable it to call upon the contractor with whom it is dealing to settle the claim, and, in the event of his failure so to do, to protect itself by reserving out of the moneys due or to become due to the contractor a sum sufficient to pay it. *Vollmer v. C. & N. W. R. Co.* 86 Wis. 305, 56 N. W. 919. The evidence here shows that Mr. Balch had the contract for building the railroad from Ladysmith to Superior. Presumably the railway company dealt with Balch, and he dealt with his subcontractors, and the railway company had nothing to do with the latter. The notice here given was certainly as effectual for preserving the rights of the railway company as it would have been had it named Philbrook as the

contractor, a party with whom the railway company had no contract relations. But, if the statute requires a certain notice to be served, it may well be said that the court has no right to substitute something therefor that may in its opinion be just as good. After all it is for the legislature, and not for the courts, to prescribe the form of this notice and what it must contain, and the legislature has said that the notice must contain the name of the contractor from whom the amount claimed is due.

In the present case it might be difficult for the laborers to ascertain from Philbrook, their employer, whether he was acting as foreman or subcontractor. He did not seem to be any too clear on the subject himself, but carries the impression by his evidence that he was simply a foreman. In this connection the evidence of Parker is significant. He was walking boss for Balch. He testified that he saw that pay rolls were correctly made out from the different subcontractors, and that he sent them to Mr. Balch's paymaster at Minneapolis, who returned to him the checks to pay the men. Sometimes these checks were handed to the men by Parker and sometimes they were delivered to the contractor for distribution. They were Balch's checks, and the men were paid directly by him, whether they worked for his subcontractors or his foremen. Philbrook started work in June and quit in September. Balch paid his men for June and July. He refused to pay for August, probably because Philbrook ran behind. Balch agreed to build the portion of the railroad on which plaintiff performed his work. He appears to have made it a practice to pay the laborers who were employed in doing that work, whether they were employed directly or through the agency of subcontractors. The laborers might well have assumed, in the absence of some showing of knowledge to the contrary, that they were in fact working directly for Balch. It is apparent from the notice itself that the plaintiff relied on such assumption. It may also well be that by placing Philbrook in the situation in which he did place

him, and by paying the men employed by him, Balch could not be heard to say that the indebtedness to the laborers was not his, but was that of some one else. *Sterling v. Ryan,* 72 Wis. 36, 37 N. W. 572; *French v. Langdon,* 76 Wis. 29, 44 N. W. 1111. Be this as it may, we think the notice served performed all the functions contemplated by the statute and was a substantial compliance therewith.

By the Court.—The judgment of the superior court is reversed, and the cause is remanded for further proceedings according to law.

COATES, Respondent, vs. MARSDEN, Appellant.

February 3—February 22, 1910.

Mortgages: Equity of redemption: Extinguishment by deed to mortgagee: Validity: Burden of proof: Pleading: Instructions to jury.

1. Though an arrangement between mortgagor and mortgagee by which the equity of redemption is apparently extinguished will be closely scrutinized and it must appear that the consideration was adequate and that no advantage was taken of the mortgagor's necessities, and though in doubtful cases the courts incline to hold that the mortgage relation still exists, nevertheless such an arrangement will be sustained if fairly made.
2. Where the mortgage relation has been apparently terminated by an absolute deed from mortgagor to mortgagee, but the mortgagor claims the excess obtained by the mortgagee, over and above the mortgage debt, on a subsequent sale of the premises, the burden of proof is upon the mortgagor, whether he bases his claim upon an express contract to pay such an excess to him or upon continuance of the mortgage relation either by agreement between the parties or because advantage had been taken of his necessities.
3. Where in such case the mortgagor's complaint alleged an express contract for payment to him of any excess received on the sale, an instruction to the jury that the controlling question in the case was whether the parties intended to cancel the mortgage debt and that upon this question the burden of proof was on the defendant, was confusing and erroneous.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

The complaint alleged ownership by the plaintiff on the 18th day of December, 1906, of 240 acres of land in Juneau county, subject to a mortgage of $2,915 held by the defendant; that prior to said date the defendant threatened to foreclose the mortgage; that owing to poor crops for a number of years plaintiff was very hard up, and that in order to save himself from financial ruin he executed a deed of the 240 acres of land aforesaid to the defendant for the nominal consideration of $1,933.50, indorsed upon the mortgage, in consideration of an agreement by defendant that he (plaintiff) should have the privilege of selling the land and retaining all that he could realize above said sum of $1,933.50 with interest; and that it was also agreed that defendant could sell the land at a fair price, and if he did so would pay to plaintiff all that he realized over and above $1,933.50 with interest, and also that the deed given to defendant should be considered to be security only for said sum of $1,933.50 and interest. It was further alleged that the lands so deeded were reasonably worth $6,000 at the time of the deed; that on March 4, 1907, the defendant sold and conveyed the lands to one Kennedy for the consideration paid of $6,000, and that thereby the sum of $3,947.76 became due to the plaintiff, being the difference between $1,933.50 with interest at seven per cent. from December 18, 1906, until November 4, 1907, and said sum of $6,000 which said defendant *by said agreement* agreed to pay to this plaintiff. Judgment was demanded for this sum with interest from November 4, 1907.

The defendant by answer admitted plaintiff's ownership of the lands, the mortgage indebtedness, the execution of the deed to himself, and his subsequent sale of the land to Kennedy, but denied that he received from Kennedy any sum in excess of $1,933.50 with interest, and denied that he ever agreed to pay any such excess to the plaintiff, or that the deed

to him was to have the effect of a mortgage. He admitted, however, that he gave plaintiff an option to purchase the premises for $1,933.50 and interest, subject, however, to defendant's right to sell the same at any time to a *bona fide* purchaser.

There was a jury trial. It appeared that the plaintiff in December, 1906, owned 320 acres of farm land, beside a house and lot in the village of Finley, and that it was all covered by a mortgage of $2,915 held by the defendant; that as a result of negotiation between the parties it was agreed that plaintiff should deed to the defendant the 240 acres in dispute here for the expressed consideration of $1,933.50, which sum was considered as being the same proportion of the whole debt as the land deeded was of the entire land, and that this deed was duly executed and delivered December 18, 1906, and the sum of $1,933.50 was indorsed on the note by the defendant and the land released from the mortgage; that at the same time, and as a part of the same transaction, a written agreement or option was drawn by a lawyer, signed by *Marsden* and given to the plaintiff, which declared that *Marsden* gave to *Coates* an option on the land (describing it) for $1,933.50 with seven per cent. interest till paid, and all taxes thereafter paid by *Marsden,* as well as all improvements which *Marsden* may put on the land, and further providing that in case *Coates* elected to purchase the land under the option he was to pay the purchase-price at a certain bank at Edgerton, Wisconsin, and then receive a warranty deed of the land free of liens, and that the time within which the payment might be made should continue until *Coates* should wish to terminate it, or until *Marsden* should sell the land to a *bona fide* purchaser and so notify *Coates.* The agreement further stated that it was given to give *Coates* the right to sell the land to other parties if he could do so in a reasonable time and realize more therefrom than had been allowed by *Marsden,* who had taken a deed in payment of $1,933.50 on

a mortgage held by him on this and other land. It further appeared that in November, 1907, the defendant traded the land in question to one Kennedy in exchange for 200 acres of land in Rock county, subject to a mortgage thereon of $9,000, and that in *Marsden's* deed to Kennedy the consideration was expressed as the sum of $6,000.

The plaintiff testified that while he and *Marsden* both dictated what should go into the written agreement or option, and that it was read over to him by the lawyer, and was intended to cover the whole agreement, still he testified (against objection) that it did not cover the whole bargain, and that as matter of fact *Marsden* agreed that if he (*Marsden*) sold the land himself he was only to keep out of the purchase price the $1,933.50 and interest, with taxes and any improvements he might put on the land, and was to pay the balance to the plaintiff; "that all he wanted out of the land was his just due, and what was realized out of it over and above was to be mine" (*Coates's*). There was unsatisfactory testimony as to the value of the land in question; the witnesses on the part of the plaintiff fixing it at from $20 to $25 an acre and the witnesses on the part of the defendant at $10 per acre. As to the Kennedy land, the testimony was also unsatisfactory, and ranged from $50 to $65 per acre.

The court charged the jury, in substance, that the controlling question in the case was the question whether or not the intention of the parties was to cancel the mortgage debt and terminate the relation of mortgagor and mortgagee, and that this intention was to be gathered from all the circumstances in evidence, including the facts as to the adequacy or inadequacy of the consideration and as to whether improper advantage was taken by one over the other; that upon this question the burden of proof was on the defendant, and the jury must be satisfied by the preponderance of the evidence that the intention of the parties was to terminate the mortgage relation and vest the title of the lands in the defendant, and if not so

satisfied the plaintiff must recover the difference between $1,933.50 and the value in money of the property received on the sale of the land to Kennedy. The jury returned a verdict for the plaintiff and assessed the damages at $1,025, and the defendant appeals.

L. E. Gettle, for the appellant.

For the respondent there was a brief by *Veeder & Veeder,* and oral argument by *C. A. Veeder.*

WINSLOW, C. J. We do not deem it necessary to discuss in detail the errors assigned; it is enough to say that the exceptions taken on the trial were sufficient to challenge not only the correctness of the various rulings and instructions, but to sharply raise the general question as to whether the case was tried and submitted to the jury upon the proper basis, and it is this general question which will be treated.

When mortgagor and mortgagee make any arrangement by which the equity of redemption is apparently extinguished, the courts will scrutinize the transaction closely; but this does not mean that the arrangement will not be sustained if fairly made. *Kuncrt v. Strong,* 103 Wis. 70, 79 N. W. 32. It is evident that there might have been three different situations in which *Coates* might, notwithstanding the absolute deed, be entitled to recover from *Marsden* the surplus which *Marsden* received on sale of the land in question over and above the amount credited on the mortgage debt, viz.: (1) by virtue of an express contract to account for such surplus made by *Marsden* as a part of the consideration for the absolute deed; (2) by virtue of an agreement, either oral or written, made at the same time, to the effect that the mortgage relation was to continue notwithstanding the deed; or (3) by virtue of the fact that the mortgagee secured his deed by fraud or taking advantage of his debtor's necessities, and hence the mortgage relation must be held to continue in defiance of the absolute deed and the intention of the parties. In the first

case supposed the recovery would be by virtue of a contract pure and simple; in the second and third cases it would be by virtue of the fact that the defendant had wrongfully disposed of the mortgaged property and must account for the proceeds over and above his mortgage interest, as for money had and received. *Barchent v. Snyder,* 128 Wis. 423, 107 N. W. 329. In either of these cases the plaintiff, being the actor, has the burden of proof. In the first supposed case he must prove the express contract on which he bases his alleged right, and in the second and third cases he must prove the continued existence of the mortgage relation. This is necessarily so because, the defendant having sold property of which he has absolute record title, the consideration received is *prima facie* his money, and any one else who claims any part of it must show some facts which overcome this *prima facie* right before he can recover.

Herein lies the fundamental difficulty with the manner in which the case was tried and submitted to the jury. Though the complaint charges that an express contract was made by *Marsden* to pay over any excess he might receive on sale of the premises, and industriously claims recovery of the amount *so contracted* to be paid, the charge of the court is to the effect that the controlling question in the case was the question whether the parties intended to cancel the mortgage debt and upon this question the burden of proof was on the defendant. This must certainly be considered as confusing and erroneous. If there was such a contract made and the plaintiff was relying on it, he had the burden of proof, and the question whether the parties intended to cancel the mortgage debt cut no figure. On the other hand, if plaintiff relied on the fact that the mortgage relation still continued by agreement of the parties or because advantage was taken of the debtor's necessities, and thus that he was entitled to recover because he was still the real owner of the equity of redemption, he had the burden of proving these facts, because on

the face of the papers the defendant had absolute title, and the man who comes into court seeking a recovery on the ground that the apparent absolute title is only a lien must produce the facts which show it.

This principle in no way interferes with the well-understood principles that such transactions will be closely scrutinized by the court, that it must appear that the consideration of the transfer was adequate and that no advantage was taken of the debtor's necessities to drive a hard bargain, and that in doubtful cases the courts incline to hold that the mortgage relation still exists. *Lynch v. Ryan,* 132 Wis. 271, 111 N. W. 707, 112 N. W. 427. These are rules governing the quantum or weight of evidence rather than the burden of proof. He who charges fraud as the basis of a recovery must prove fraud. It will take little evidence, perhaps, to make a *prima facie* showing of fraud in such a case. The fact that the relation of debtor and creditor existed, and the fact that no part of the debt was discharged, or that the consideration was not fairly adequate, will call for complete and satisfactory explanation and proof on the part of the mortgagee; but this does not change the rule that the burden of proof is with the plaintiff, and that he should put in all his evidence tending to show fraud, either direct or circumstantial, while making his case. *Winn v. Itzel,* 125 Wis. 19, 103 N. W. 220.

It may be remarked here that this action does not seem to be based on the fact that defendant took advantage of plaintiff's necessities to drive a hard bargain which a court should set aside, but rather that a bargain or perhaps two bargains were made which the defendant has failed to carry out. While the complaint alleges that foreclosure was threatened, and that the plaintiff was hard up and agreed to the transfer to save himself from financial ruin, he nowhere alleges that the agreements which he finally made and which he is endeavoring to enforce in this action were unfair or unsatis-

factory or that he did not voluntarily agree to them, and the evidence of anything like fraud, undue advantage, or coercion seems very weak. The evidence as to values both of the Juneau county land and the Rock county land is also very unsatisfactory.

Upon the whole case we cannot say that it appears that substantial justice has been done. The plaintiff based his case upon contract and seems to have recovered upon tort, because the court charged the jury that the vital point in the case was the question of the intention of the parties, and upon this question the "adequacy or inadequacy of the consideration, and whether or not improper advantage was taken by one over the other, are all matters proper to be considered."

If upon another trial the plaintiff proposes to rely upon fraud, coercion, or undue advantage, it would seem safer to allege such facts by amended complaint. In the event that such allegation be made, it would be better to determine the issues by special verdict, and thus the questions whether any contract was in fact made to return the excess, whether it was agreed that the mortgage relation should continue, and whether undue advantage was taken of the plaintiff so that the mortgage relation never in fact terminated, could be submitted without confusion and each with its proper instruction.

By the Court.—Judgment reversed, and action remanded for a new trial.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant, vs. MCADAM, imp., Respondent.

February 4—February 22, 1910.

Contracts: Validity: Construction: What law governs: Intention of parties: Enforcement in other states: Comity: Public policy: Married women: Accommodation notes.

1. As to mere personal contracts, their validity and interpretation is referable to the *lex loci contractus*, unless the parties intended they should be governed by the *lex loci solutionis* or that of some other place, the real place of the contract being a matter of mutual intention, except in exceptional circumstances evincing a purpose in making the contract to commit a fraud on the law.
2. What the intent was, mentioned in No. 1, as to the place of the contract in any case, is generally determinable by presumption of fact that the place of the contract was intended to be that where it was actually made, unless the place of performance was elsewhere, then the presumption is that the latter was intended, but such presumptions are rebuttable. In this the term "place of the contract" means the place mutually intended for reference as to validity and interpretation.
3. The law as to manner of performance is referable to the place of performance, while remedies for nonperformance are referable to the law of the forum where performance is sought to be enforced.
4. A contract valid by the law of the place thereof is valid everywhere.
5. The affording of remedies in one country for enforcing a contract which would not be valid if made in such country, but is valid by the law of the place where it was made, depends upon judicial comity of nations.
6. The comity mentioned is uniformly extended unless such contracts as the one sought to be enforced are contrary to the public policy of the country of the forum, as declared by its courts or its lawmaking power on grounds of good morals, or the state or its citizens would be injured.
7. The scope of the comity spoken of, within reasonable limitations, is determinable, as a matter of judicial policy, by each state for itself.
8. The rule that the law of a place of a contract governs, as to its validity and interpretation, applies to the capacity, including that of married women, to contract.

9. The rule that a contract, valid by the law of the place thereof, is valid everywhere, is without exception, notwithstanding in some cases a foreign contract is not enforceable.
10. A foreign contract, of a class which if it were made in the country of the forum would be contrary to the law thereof, is not necessarily unenforceable in such forum because such a contract is contrary to public policy. To be so, the contract must be, by moral standards in the judgment of the court, pernicious and injurious to the public welfare.
11. The contract of a married woman as accommodation maker of commercial paper having not been judicially declared unenforceable in this state on grounds of public policy, nor prohibited by legislation as pernicious, is enforceable in our courts, in case of its having been made in another state where such contracts are valid, unless such contracts are, in fact, inherently bad in the sense indicated in the foregoing rules.
12. The general legislative policy of this state as to relieving married women from common-law disabilities to contract, and other considerations, negative the idea that full right in that regard would involve anything inherently bad and warrant our courts in refusing to enforce the foreign contract of a married woman as accommodation maker of a promissory note on grounds of public policy.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Jefferson county: GEORGE GRIMM, Circuit Judge. *Reversed.*

Action to recover on a promissory note against *Gertrude McAdam,* a married woman, who signed, as accommodation maker, with her husband and another. At the time of such execution all the makers were residents of South Dakota and that was also the place of performance. When the action was commenced respondent and her husband were residents of Wisconsin. She pleaded, separately, incompetency to bind herself as an accommodation maker because of her being a married woman. By the law of South Dakota, she had such competency, while by the law of this state she had not.

The court held that the note could not be enforced against respondent in this state, because of incapacity of a married woman to so bind herself here, and, therefore, she was entitled to judgment dismissing the action as to her with costs, without

prejudice to plaintiff seeking a remedy elsewhere. Judgment was so rendered.

The cause was submitted for the appellant on the brief of *J. C. McMath* and *Herbert J. Piper,* and for the respondent on that of *Charles E. Williams,* attorney, and *Tullar & Lockney,* of counsel.

Counsel for the appellant cited 1 Wharton, Confl. of Laws (3d ed.) p. 279, § 118*b,* p. 275; 25 L. R. A. 178–181, note; 57 L. R. A. 513–527, note, 520; 46 Am. St. Rep. 454–457, note; 85 Am. St. Rep. 552–578, note; 51 Cent. Law Jour. 111–114, note; 54 Cent. Law Jour. 223–230; 3 Page, Contracts, § 1730; 9 Cyc. 676; 22 Am. & Eng. Ency. of Law (2d ed.) 1334; 26 Cent. Dig. p. 1679, § 273; *Brodnax v. Ætna Ins. Co.* 128 U. S. 236, 32 L. Ed. 445; *Sutton v. Aiken,* 62 Ga. 733, 741; *Wright v. Remington,* 12 Vroom, 48, 32 Am. Rep. 180; *Matthews v. Dickenson,* 73 N. Y. Supp. 190; *Garrigue v. Kellar,* 164 Ind. 676, 74 N. E. 523; *Marks v. Germania Sav. Bank,* 110 La. 659, 34 South. 725; *First Nat. Bank v. Mitchell,* 92 Fed. 565, 34 C. C. A. 542; *Freret v. Taylor,* 119 La. 307, 44 South. 26, 121 Am. St. Rep. 522; *Law v. Smith,* 68 N. J. Eq. 81, 59 Atl. 327; *Baer Bros. v. Terry,* 108 La. 597, 32 South. 353, 92 Am. St. Rep. 394; *Baer Bros. v. Terry,* 105 La. 479, 29 South. 886; *Robinson v. Queen,* 87 Tenn. 445, 10 Am. St. Rep. 690, 3 L. R. A. 214, 11 S. W. 38; *Bowles v. Field,* 78 Fed. 742; *Young's Trustee v. Bullen,* 19 Ky. Law Rep. 1561, 43 S. W. 687; *Robison v. Pease,* 28 Ind. App. 610, 63 N. E. 479; *Union Nat. Bank v. Chapman,* 169 N. Y. 538, 62 N. E. 672; *F. B. Hauck C. Co. v. Sharpe,* 83 Mo. App. 385; *Clark v. Eltinge,* 38 Wash. 376, 80 Pac. 556; *Armstrong, C. & Co. v. Best,* 112 N. C. 59, 17 S. E. 14, 25 L. R. A. 188, 34 Am. St. Rep. 473; *Ruhe v. Buck,* 124 Mo. 178, 27 S. W. 412, 25 L. R. A. 178, 46 Am. St. Rep. 439; *Young v. Hart,* 101 Va. 480, 44 S. E. 703; *First Nat. Bank v. Shaw,* 109 Tenn. 237, 70 S. W. 807, 59 L. R. A. 498; *Thompson v. Taylor,* 65 N. J. Law, 107, 46 Atl. 567; *Studebaker Bros. Co. v. Mau,* 13 Wyo. 358, 82 Pac.

2; *Southern Exp. Co. v. Owens,* 146 Ala. 412, 41 South. 752, 9 Am. & Eng. Ann. Cas. 1143; 1 Wharton, Confl. of Laws (3d ed.) p. 281; *Bank of Louisiana v. Williams,* 46 Miss. 618, 12 Am. Rep. 319; *Dulin v. McCaw,* 39 W. Va. 721, 20 S. E. 681; *Johnson v. Fletcher,* 54 Miss. 628, 28 Am. Rep. 388; *Morton & Hamner v. Valentine,* 15 La. Ann. 150; *Milliken v. Pratt,* 125 Mass. 374, 28 Am. Rep. 241; *Lamb v. Powder River L. S. Co.* 132 Fed. 434, 439; 1 Case and Comment (November, 1894), "Comity as to contracts of married women;" *Fauntleroy v. Lum,* 210 U. S. 230; *Fox v. Postal T. C. Co.* 138 Wis. 648, 120 N. W. 399; *Bartlett v. Collins,* 109 Wis. 477, 85 N. W. 703; *Merrell v. Purdy,* 129 Wis. 331, 109 N. W. 82; sec. 2345, Stats. (Supp. 1906); 22 Am. & Eng. Ency. of Law (2d ed.) 1329.

The following cases were cited by counsel for the respondent: *Merrell v. Purdy,* 129 Wis. 331, 109 N. W. 82; *Kriz v. Peege,* 119 Wis. 105, 95 N. W. 108; *First Nat. Bank v. Shaw,* 109 Tenn. 237, 70 S. W. 807; *Ruhe v. Buck,* 124 Mo. 178, 27 S. W. 412; *Armstrong, C. & Co. v. Best,* 112 N. C. 59, 17 S. E. 14; *Thompson v. Taylor,* 65 N. J. Law, 107, 46 Atl. 567; *Studebaker Bros. Co. v. Mau,* 13 Wyo. 358, 82 Pac. 2; *Dulin v. McCaw,* 39 W. Va. 721, 20 S. E. 681; *Bank of Louisiana v. Williams,* 46 Miss. 618, 12 Am. Rep. 319; *Hayden v. Stone,* 13 R. I. 106; *Hanover Nat. Bank v. Howell,* 118 N. C. 231, 23 S. E. 1005; *Frierson v. Williams,* 57 Miss. 451; *Milliken v. Pratt,* 125 Mass. 374; *Fonseca v. Cunard S. Co.* 153 Mass. 553, 27 N. E. 665; *Emery v. Burbank,* 163 Mass. 326, 39 N. E. 1026; *Fox v. Postal T. C. Co.* 138 Wis. 648, 120 N. W. 399; *Bartlett v. Collins,* 109 Wis. 477; *Rose v. Kimberly & C. Co.* 89 Wis. 545; *Filkins v. Nunnemacher,* 81 Wis. 91; *McClure v. Campbell,* 71 Wis. 350; *Van Steenwyck v. Washburn,* 59 Wis. 483; *Wight v. Rindskopf,* 43 Wis. 344.

MARSHALL, J. The appeal raises for decision this proposition: Is a married woman's contract as accommodation

maker of a promissory note, which is valid in the place where made, enforceable in the courts of this state, such a contract not being valid if made here? The proposition, in the main, is governed by a few quite elementary principles.

The first principle is this: As to mere personal contracts the law thereof as to their validity and interpretation, is that of the place where they were made; the *lex loci contractus*, unless the parties thereto intended that they should be governed by the law of the place of performance; the *lex loci solutionis*, or of some other place. That is, the place of the contract is, generally speaking, a matter of mutual intention, but the intended place, as determined by legal presumption in some cases and evidentiary circumstances in others, settles all questions as to the legal test of validity and interpretation. Such presumption, in the absence of evidence to the contrary, is that the place of making and performance, in a physical sense, is the place in a legal sense, but the place of performance when different from that of the actual making, is the place in such legal sense, subject to the presumption being rebutted by clear evidence of intention, this being again subject to some exceptions in case of intention to commit a fraud on the law, such exceptions being possible but rare and not concerned in the case in hand. *Davis v. C., M. & St. P. R. Co.* 93 Wis. 470, 67 N. W. 16, 1132; *Shores L. Co. v. Stitt*, 102 Wis. 450, 78 N. W. 562; *Bartlett v. Collins*, 109 Wis. 477, 85 N. W. 703; *Brown v. Gates*, 120 Wis. 349, 97 N. W. 221, 98 N. W. 205.

Another rule is this: The law of the place of performance regulates the matter in that regard, while matters respecting remedies depend upon the law of the forum. *Brown v. Gates, supra.*

A third rule results, logically, from those mentioned, viz.: A contract which is valid in the place thereof is valid everywhere.

A fourth rule is this: The law of one state having, *ex pro-*

prio vigore, no validity in another state, the enforcement of a foreign contract which would not be valid by the law of the forum where its enforcement is judicially attempted, depends upon comity which is extended for that purpose, unless the agreement is contrary to the public policy of the state of the forum, in that it is contrary to good morals, or the state or its citizens would be injured by the enforcement, or it perniciously violates positive written or unwritten prohibitory law; the extent to which comity will be extended being very much a matter of judicial policy to be determined within reasonable limitations by each state for itself. *Finney v. Guy,* 106 Wis. 256, 276, 82 N. W. 595; *Hunt v. Whewell,* 122 Wis. 33, 42, 99 N. W. 599; *Fox v. Postal T. C. Co.* 138 Wis. 648, 120 N. W. 399. In the last case cited, referring to *The Kensington,* 183 U. S. 263, 22 Sup. Ct. 102, the court said:

"Every state, within certain limitations not necessary here to indicate, has a constitutional right to establish its own peculiar policy. That may be done by legislative enactment or by judicial conception and interpretation of the common law," and we may add here of what is injurious to the welfare of the state or its citizens. " 'The general principle that the *lex loci* governs as to the validity of contracts is subordinate to and qualified by' . . . the supreme principle which inheres in the very nature of sovereignty, that comity cannot set at naught the public policy of a country."

A further rule is this: The doctrine that the law of the place of a contract governs as to its interpretation and validity, applies to the capacity of parties, including that of married women, to bind themselves in the manner attempted. Story, Conflict of Laws, §§ 103, 241; *Milliken v. Pratt,* 125 Mass. 374.

We may well say, in passing, that, while contracts which, though valid in the place thereof, are not enforceable in the country where enforcement is attempted for reasons above suggested, are often spoken of in text-book and other authorities, as exceptions to the rule that the validity of a contract is

referable to the place which the parties thereto at the time of making intended should be incorporated into it, they are not exceptions strictly so called. The rule in a technical sense is without exception. In practical effect, the rule of the forum supersedes it leaving the contract without remedy there to enforce it and, in that sense, void.

The last rule that need be stated is this: A contract under the foregoing is not, necessarily, contrary to the public policy of a state, merely because it could not validly have been made there, nor is it one to which comity will not be extended, merely because the making of such contracts in the place of the forum is prohibited, general statements to the contrary notwithstanding. In *Milliken v. Pratt, supra,* the court remarked substantially, even a contract expressly prohibited by the statutes of the state in which the suit is brought, if not in itself immoral (the term "immoral" being used in the broadest sense), is not, necessarily, nor usually, deemed so invalid that the comity of the state, as administered by its courts, will refuse to entertain an action under all circumstances to enforce it. There must be something inherently bad about it, something shocking to one's sense of what is right as measured by moral standards, in the judgment of the courts, something pernicious and injurious to the public welfare. In Greenhood on Public Policy at page 46, cited by counsel, the following rule is deduced from the authorities cited:

"When a contract is valid under the public policy of the state where made, it will be enforced in another state, although the same would by the statute laws of the latter state be void, unless its enforcement would exhibit to the citizens of the state an example pernicious and detestable."

It will occur to one, on a moment's reflection, that the last foregoing rule could not be otherwise, else the doctrine that a contract valid at the place where made is valid and, generally speaking, enforceable everywhere, would be wholly nullified as to foreign contracts which would not be valid if made in

the place enforcement is sought. The rule would be useless since, in every case of such a contract, it would never be enforceable except in the place where made. The correctness of the rule and the absurdity of the idea that every contract which, if made in the jurisdiction of the forum, would not be valid, cannot be enforced there, are so clear that we would hardly be justified in dealing with the numerous elementary principles, as above, leading up to the final solution of the proposition upon which this appeal must be grounded, were it not for the obvious fact that the case was decided below and the judgment is sought to be sustained here upon the theory, merely, that because such a contract as that in question would not be valid if made here, it necessarily cannot be enforced in our courts, though it is perfectly valid where it was in fact made, the court below and counsel supposing that the general principle stated in *Fox v. Postal T. C. Co.* 138 Wis. 648, 120 N. W. 399, necessarily applies to such a contract as the one in hand. There the contract was of the class regarded as pernicious in character and was one which, by the settled judicial policy of this state, is not enforceable in its courts.

Many illustrations might be given of instances of contracts made elsewhere, which would not have been valid if made in the state where judicial enforcement was attempted, including instances where the invalidity was referable to statutory prohibitions, being afforded by judicial remedies in the latter jurisdiction. Such as contracts providing for a rate of interest which would be usurious with penalizing consequences, even to the extent of forfeiture of principal and interest as to such a contract, if made in the law of the forum. *Fisher v. Otis,* 3 Pin. 78; *Richards v. Globe Bank,* 12 Wis. 692; *Newman v. Kershaw,* 10 Wis. 333; *Vliet v. Camp,* 13 Wis. 198; *Lyon v. Ewings,* 17 Wis. 61; *Maynard v. Hall,* 92 Wis. 565, 66 N. W. 715; *Miller v. Tiffany,* 1 Wall. 298, 310. Also a contract allowable by the statute of frauds where made held enforceable in another country where such a contract would be

void by the written law. *Scudder v. Union Nat. Bank,* 91 U. S. 406. The same is true of Sunday contracts. *Brown v. Gates,* 120 Wis. 349, 97 N. W. 221, 98 N. W. 205, 349; Hammon, Contracts, § 260, and cases cited. The illustrations could be extended to many subjects, and contracts which would, if made here, not be enforceable because extinguished by the statute of limitations of our state. The situations indicated in the foregoing are entirely different from that in *Fox v. Postal T. C. Co., supra; Wight v. Rindskopf,* 43 Wis. 344, and *Bartlett v. Collins,* 109 Wis. 477, 85 N. W. 703. The dividing line, it will be seen, is at the point where inherent harmfulness commences. The latter cases are on the fatal side while the former are on the other.

From the foregoing it will be readily appreciated how a conflict between the judicial holdings of different countries might, as it has, create confusion respecting the proposition under consideration. There is opportunity for courts to be, as they seemingly have been in some instances, misled by looking only to the rule that a contract valid where made, which if made in the place of the forum would be contrary to law and so not enforceable, is likewise remediless, not regarding that the rule is a mere exception, and quite a narrow one at that, to the broader rule covering contracts in general, but still greater opportunity for courts to take conflicting position by reason of each being, to a very large extent, supreme in its own jurisdiction as to what elements render a contract inherently harmful and so to what extent, by rules of comity, the foreign law should be given effect.

The opportunities for conflict referred to have operated efficiently as to the proposition under discussion, as illustrated by cases holding that, in the circumstances here, the married woman's contract cannot be enforced (*Armstrong, Cator & Co. v. Best,* 112 N. C. 59, 17 S. E. 14; *Thompson v. Taylor,* 65 N. J. Law, 107, 46 Atl. 567; *Hayden v. Stone,* 13 R. I. 106), while the great weight of authority is to the contrary

upon the ground that such a contract is not against the policy of the law in the sense that the term is used in testing whether the foreign law of a contract as to its validity can be enforced. On this very many citations might be given. The following are but a very few of them: *Milliken v. Pratt,* 125 Mass. 374; *Ross v. Ross,* 129 Mass. 243, 246; *Garrigue v. Kellar,* 164 Ind. 676, 74 N. E. 523; *Baer Bros. v. Terry,* 108 La. 597, 32 South. 353; *Young v. Hart,* 101 Va. 480, 44 S. E. 703; *Baum v. Birchall,* 150 Pa. St. 164, 24 Atl. 620; *Young's Trustee v. Bullen,* 19 Ky. Law Rep. 1561, 43 S. W. 687; *Gibson v. Sublett,* 82 Ky. 596; *Robinson v. Queen,* 87 Tenn. 445, 11 S. W. 38; *Bell v. Packard,* 69 Me. 105; *Bowles v. Field,* 78 Fed. 742; *First Nat. Bank v. Mitchell,* 92 Fed. 565.

The industry of counsel resulted in bringing to our attention three judicial authorities to support the negative of the proposition under consideration which seem to be sufficiently in point to warrant noticing them. Counsel cite other cases: *First Nat. Bank v. Shaw,* 109 Tenn. 237, 70 S. W. 807; *Ruhe v. Buck,* 124 Mo. 178, 27 S. W. 412; *Dulin v. McCaw,* 39 W. Va. 721, 20 S. E. 681; *Bank of Louisiana v. Williams,* 46 Miss. 618; *Studebaker Bros. Co. v. Mau,* 13 Wyo. 358, 80 Pac. 151, and the like. They either in principle support *Milliken v. Pratt, supra,* and the numerous cases we have cited, or go upon the ground that in the particular instance merely the manner of enforcement of the contract was involved, which is governed by the law of the forum, or the contract, though made in the foreign state, related to real property in the state of the forum; was not a mere personal contract enforceable *in personam,* but one enforceable *in rem* and by an action in the nature of one *in rem.* All these distinctions must be kept in mind. Failure to do so has led some courts sometimes into awkward positions and at others worked great prejudice to parties.

The three cases cited by counsel to which we accord some significance, after careful research we are unable to add to,

from other jurisdictions, though there may be some. Such few are entitled to very little weight.

Armstrong, Cator & Co. v. Best, 112 N. C. 59, 17 S. E. 14, went upon the obviously erroneous theory that the law of the forum, as to the capacity of parties to contract, governs. That was stated without citation of authority, and it seems none of moment could have been cited. In a later case, *Hanover Nat. Bank v. Howell,* 118 N. C. 271, 23 S. E. 1005, the court made an effort to place its doctrine on a more logical ground. After all the court seems to have doubted the soundness of its position and rather invited legislative assistance for the purpose of avoiding it.

In *Hayden v. Stone,* 13 R. I. 106, the court approved the general principle that the validity of a contract is referable to the law of the place where made, but leaned to the idea that it does not extend to the capacity to contract, and concluded in any event that the question in the particular instance really considered the remedy, and, as there was none afforded in that state to its own citizens to enforce a married woman's mere promissory note, none could be afforded to a citizen of another state. The infirmity of the logic, when tested by elementary principles, is apparent at once, except so far as it was competent for the Rhode Island court, in the absence of any restraint in the written law, to establish the doctrine announced as the public policy of that state, if it saw fit.

In *Brown v. Browning,* 15 R. I. 422, 7 Atl. 403, the court seems to have endeavored to very much limit its former decision, suggesting, in effect, that it did not go upon the validity of the contract which was governed by the Massachusetts law where it was made, but to the particular remedy by attachment sought to be used.

Thompson v. Taylor, 65 N. J. Law, 107, 46 Atl. 567, dealt with a married woman's agreement to be bound as an accommodation maker, as in this case, in face of an express prohibitory statute forbidding such agreements. The court rec-

ognized the general rule declared in the leading case of *Milliken v. Pratt,* 125 Mass. 374, but concluded that the legislature having condemned such contracts as harmful, that established a public policy for the state precluding its courts from being used on grounds of comity to enforce such a contract, regardless of its being valid by the foreign law.

Little more need be said to reach a logical conclusion respecting the proposition before us. The contract, as to respondent, is valid, as conceded, by the law of the place where it was made. Therefore, it is valid here. Being so valid, appellant is entitled, as matter of right, by the universal comity by which the law of one country as to contracts in general, is recognized and enforced in the jurisdiction of the forum of another, if they are valid in the foreign jurisdiction, unless they fall within some exception in that regard. They do not, as has been seen, in that such contracts are condemned as pernicious and forbidden by our written law, as in New Jersey. They are not contrary to any public policy of this state heretofore, in the code of unwritten law, established by our court. If there is any ground for saying they are inherently harmful, it is referable, solely, to the ancient common-law rule of disability, the reason whereof reaching to the present, is but little more than a shadow, a rule which, in great part, was changed by legislation long ago. That such contracts are not to be regarded as inherently harmful, is evidenced by the fact that they are permitted by the written law of a large portion of the states and in most others legislation in that direction is progressive. It is further evidenced by the fact that they are recognized as not inherently bad by substantially all the courts of this country. The exceptions are not significant. This court, except as restrained by principle and the great weight of authority, is free to take its own stand, to declare for this state what shall be, in the particular situation, its public policy, till the source for written law shall have acted in the matter. The court cannot say that such contracts are against

public policy merely because they have not the sanction of the common law as we have seen. The position of the court in *Fox v. Postal T. C. Co.* 138 Wis. 648, 120 N. W. 399, or any other court in a similar situation, has nothing to do with the case, unless the contract can be classified with contracts dealt with in such situations. How can the court say that it should be so classed, that it should be located within the broadest possible boundaries of the immoral, the inherently bad? Nearly all the common-law disabilities of women to contract have been removed. They can acquire and enjoy property and make all contracts necessary or convenient in that regard. They can, in equity, charge their property substantially at will. There is little left of a business nature which men can do that they cannot do. They have nearly all the rights of men, and some besides, and on all sides are making pressing claims with distinguished support for what is yet withheld not very firmly nor perhaps very logically. How can the ordinary business contract in question, so common among men of ordinary perceptions, be said to be contrary to any policy of this state heretofore, or which should now be, adjudged bad in the interest of good morals? We can give no answer to that consistent with respondent's position. It is considered there is none, and that the proposition under consideration must be answered in the affirmative. The decision appealed from is erroneous. The contract of respondent must be held as valid and enforceable here as in the place where it was made.

By the Court.—The judgment in respondent's favor is reversed, and the cause remanded with directions to amend the judgment against the codefendant so as to be against him and respondent as well.

ANDERSON, Appellant, vs. SAVOY, Respondent.

February 4—February 22, 1910.

Sales: Breach by vendor: Damages.

Where, after breach by the vendor of a contract to furnish ice to a retailer, the latter made no reasonable effort to procure ice elsewhere, although he might have obtained plenty of it at, or for less than, the contract price, and no actual damage from the breach is shown, only nominal damages are recoverable.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is a second appeal from judgment in the same action, reported 137 Wis. 44, 118 N. W. 217. Upon *remittitur,* the cause was referred to a referee to take evidence upon the question of damages, and was then heard in court upon the evidence so taken and upon some other evidence offered in open court. The court found the contract as stated upon the former appeal; the breach thereof by the defendant substantially as there set forth; that the wholesale price of ice during the season of 1904 was from sixty cents to $1 per ton; that there were three wholesale concerns dealing at wholesale in ice in the city of Milwaukee, where plaintiff carried on a retail business; that plaintiff made no application to such wholesalers, although they were dealing in ice of the kind required by him in his contract, and made no reasonable effort to procure ice to take the place of that which the defendant failed to furnish. Accordingly the court rendered judgment for the plaintiff for six cents damages; also judgment for the defendant upon its counterclaim for the unpaid price of the ice which plaintiff had received. From that judgment plaintiff appeals.

For the appellant the cause was submitted on the brief of *McGee & Jeger.*

C. E. Armin, for the respondent.

BY THE COURT. The finding of the court is not opposed by any clear preponderance of evidence. With that finding, substantially to the effect that plenty of ice could have been purchased at or less than the contract price nearer to plaintiff's place of business, and that he made no reasonable effort to obtain it, he has failed to establish general damages in any amount. Whether there might, nevertheless, be actual damages in the way of disturbance of business before plaintiff could obtain ice elsewhere when defendant unexpectedly failed to deliver it, or for expenses incurred in searching for ice, it is unnecessary to discuss. No evidence was offered of the amount of any such damages, even if it might be inferable that plaintiff had suffered them. Therefore no recovery for more than nominal damages could be awarded him.

Judgment affirmed.

LILLIS, Respondent, vs. BEAVER DAM WOOLEN MILLS, Appellant.

February 4—February 22, 1910.

Master and servant: Injury from unsafe machinery: Special verdict: Definiteness: Abnormal action of machine: Discoverable defects: Evidence: Questions for jury: Assumption of risk.

1. In an action for personal injuries sustained by plaintiff while operating a machine which the complaint alleges was unsafe in several particulars, the special verdict should be so framed that it will show in which, if any, of such particulars the jury find that the machine was unsafe.
2. Where injuries to an employee are claimed to have been caused by abnormal action of a machine in starting up suddenly without apparent cause after the drive belt had been shifted to a loose pulley and the machine had come to a full stop, the mere statement of plaintiff that it so started is not sufficient to sustain an inference that there was a discoverable defect in the

machine, as against evidence, otherwise undisputed, that the machine had been used for years without any abnormal action and that it was of proper and safe construction and in good repair.

3. An adult of ordinary intelligence and experience who has learned from working in and about a woolen mill and its machines the usual conditions and hazards of the business, must be deemed, as matter of law, to have known the risk incident to putting his hand into a machine (in this case a mixing picker) while it was running, to remove clogging material.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

This is an action to recover damages for the loss of a hand, which was so mangled as to require its amputation, the injury having been received while the plaintiff was engaged in removing some clogging material from a mixing picker, a machine operated by him for the defendant in its mill.

The material to be run through the machine is placed upon a feed apron, which was an endless belt of slats about four feet wide. The material is carried forward by the apron into a series of feed rollers, which were studded with teeth to catch the material and carry it forward. The material is delivered by this series of feed rollers into a large cylinder, four feet in diameter, where the stock is further operated on, and is then carried into a spout about six inches wide by thirty inches in length, through which it is forced by the air from a fan run in connection with the rest of the machine. Occasionally, while the machine is being operated, the stock material will accumulate between the fan and the large cylinder and the machine become clogged. As originally constructed the machine had a lever for stopping the feed apron and the feed rollers while the rest of the machine continued to run, and ordinarily, when the machine became clogged, if the feed apron and the feed rollers were stopped by the use of this lever and the feeding of more material into the machine was thus prevented, it would clear itself of the clogging

material. If the machine was not able to clear itself in this way, it was necessary to stop all parts of the machine, remove some or all of the feed rollers, and the operator of the machine would then be able to see where the clogging material was lodged and could reach in and remove it with his hand. To remove the clogging material in this way took considerable time. The machine was so operated for several years in the defendant's mill.

In May, 1903, the defendant installed another machine in the room in which the mixing picker had been operating, and in rearranging the room the mixing picker was moved into an alcove, which would hold it with but little open space about it. In thus placing the machine it was found that the drive belt between the drive shaft and the drive wheel of the machine on the shaft of the large cylinder would interfere with the operation of the lever controlling the feed apron and the feed rollers, and the lever was therefore removed. A spout at the back of the machine, two and one-half to three feet in length, through which the stock material was blown from the machine by the fan, was also removed, and the stock material was discharged thereafter into an adjoining room through a hole in the wall, close to which the machine stood. When the machine became clogged in the new position the operator would throw the drive belt from the drive pulley to a loose one and thus throw off the power from the whole machine. He would then wait until all parts of the machine had come to a stop and go into the room into which the stock material was discharged from the machine. Reaching through the hole in the wall he would put his hand past the fan and take out the clogging material from between the fan and the large cylinder. This could be done with safety when the machine was at a standstill.

Plaintiff was sixty years of age in June, 1905. He had lived in Beaver Dam for forty-two years and had worked off and on during that time in the defendant's mill. He went

to work at this mixing picker in May, 1905, and worked at it until October 17, 1905. When he started work at this machine he was instructed as to its operation and of the way in which clogging material was then removed from the machine. On October 17, 1905, the plaintiff received the injury for which he seeks to recover damages. On the trial of the action he testified that while operating the machine it became clogged. He shifted the drive belt from the drive pulley to the loose pulley and waited three, four, or five minutes until all of the parts of the machine had come to a standstill. He then went into the discharging room and reached through the wall and the fan to the clogging material. He removed two handfuls of the material and reached in for another handful, when the machine suddenly started. His hand was caught by the hooks on the large cylinder, and, his arm being caught and drawn into the machine by the starting of the fan, his hand was so severely mangled as to require amputation.

On the trial of the action a fellow workman in the room at the time of the accident testified that the plaintiff had shifted the drive belt to stop the machine. He also testified that no one started the machine after the plaintiff went into the discharging room. There was no evidence as to whether or not the machine continued to run after the plaintiff was injured and came back from the discharging room. There was evidence that the machine had been operated from May, 1903, to the time of the accident in the same place and in the same condition as it was at the time of the accident; that during that time it had properly performed the work for which it was designed, and that it had never started to run without apparent cause, as it is alleged it did in the instant case. There was evidence, also, that the belt which drove the fan had fallen from the drive wheel to the floor.

The court answered the first question of the special verdict in the affirmative. The question was whether or not the

plaintiff was injured by having his left hand caught by the cock-spur hooks in the large cylinder of the mixing picker in the defendant's mill on October 17, 1905, while he was attempting to clear away the stock from between the fan and this cylinder of the machine.

The jury found by the special verdict that the mixing picker machine was not a reasonably safe appliance for the use of the plaintiff, that the unsafe condition was known to the defendant, and that this condition was the proximate cause of the plaintiff's injury. The jury also found that the plaintiff as a reasonable person of his age, intelligence, and experience did not know and appreciate the peril and danger to which he exposed himself by putting his arm and hand into the machine in the manner and under the circumstances disclosed by the evidence, and that he could not be presumed to have such knowledge and appreciation of the danger. They assessed the damages at $3,591.68.

The defendant excepted to the action of the court in permitting plaintiff to amend his complaint. In view of the grounds upon which the decision of this court is based, this and other exceptions are immaterial and the details thereof will not be stated here.

The defendant appeals from the judgment entered upon the verdict found by the jury.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent the cause was submitted on the brief of *Malone & Miller.*

SIEBECKER, J. The plaintiff seeks recovery upon the ground of defendant's negligence. It is not clear from the record upon what ground of negligence the case was submitted to the jury by the court. The court submitted an inquiry as to whether the machine as located at the time and place of the accident was reasonably safe for the plaintiff to

perform his services, and instructed the jury that they must determine from the evidence whether it was a reasonably safe machine. The question and instructions do not specify wherein the defendant is charged to have been negligent or what is claimed to have made this an unsafe machine. An examination of the pleading leads us to the conclusion that the plaintiff asserts that this was an unsafe machine because of the removal of the lever by which the operation of the feed apron and rollers could be controlled, because of the removal of the discharge spout, or because the machine furnished by the defendant was of defective construction or was in such want of proper repair that an abnormal action resulted and the machine started up after the drive belt had been removed from the drive pulley and the machine had been brought to a standstill. This state of the case required the court to frame a special verdict to meet these different issues, if he determined that there was credible evidence tending to support any of the alleged charges of negligence. The submission of the general question as to whether the machine was a reasonably safe one, accompanied by instructions which do not point out in what respect the jury must find negligence to exist to warrant an affirmative answer to such a question, renders the verdict too uncertain upon the litigated issue respecting a defect in the machine, and we cannot ascertain wherein the jury found the machine to be actually defective and unsafe. Did the jury find that the machine was unsafe and dangerous on account of the removal of the lever connected with the feed apron and rollers, because of the removal of the discharge spout, thus exposing the operator to unnecessary danger in cleaning out the clogged wool, or was the machine found defective in construction or for want of repair? The course of procedure adopted leads to dangerous uncertainties, because the determination of the issues framed by the pleadings is left too indefinite and uncertain. However, we need not consider this further, since

the appellant claims that there is no evidence in the case to support the jury's finding upon any of the grounds of the alleged unsafe condition of the machine. The removal of the discharge spout in no way impaired the use of the machine, nor could it in any way have anything to do with the alleged abnormal starting up of the machine while the plaintiff was clearing out the wool that clogged it. Hence it need not be considered as involved in the cause of the plaintiff's injury.

The plaintiff claims that he was injured by the abnormal action of the machine, in that the large picker cylinder and the fan suddenly and unexpectedly started to operate after he had brought the machine to a standstill and while he had his hand near these parts in order to remove the wool that clogged their operation. The question arises: Is there evidence tending to show that the machine was defective and that such defect caused an abnormal starting of the machine after, as plaintiff claims, it was brought to a standstill? We have examined the evidence with much care to ascertain how the removal of the lever by which the feed apron and rollers were set in motion or stopped could in any way have been a defect related to the abnormal movement of the machine which caused plaintiff's injury. Confessedly its only purpose was to control the feed apron and rollers. It had no connection with the appliance by which the main drive belt was shifted onto or off from the drive pulley on the large cylinder shaft, by which the machine was set in motion. Its absence or presence could in no way have started or stopped the main cylinder and fan and have caused plaintiff's injury. The case is therefore wholly wanting in proof that the omission of this lever constituted a defect in the machine which could proximately have caused plaintiff's injury.

This brings us to the question: Is there evidence of some other defect in the machine which the defendant permitted to exist and which could have caused plaintiff's injury? The facts show that the machine is of the type customarily

used for the purposes for which the defendant used this one, and that it has been used from May, 1903, to the present time in the same condition and location. There is no evidence that it was defectively constructed, out of repair, or that there was a discoverable defect in the machine, aside from the plaintiff's statement to the effect that on the day in question it unexpectedly started without apparent cause, after he had removed the drive belt from the drive pulley and shifted it onto the loose pulley. There is no evidence of any discoverable defect in the drive belt, pulleys, or shifting apparatus connected therewith which were used in starting and stopping the machine. No evidence was adduced to contradict the showing that the machine was of proper and safe construction and in good repair, except the single statement of the plaintiff that the large cylinder and the fan started abnormally at the time in question. The respondent relies on this evidence to show that the defendant did not provide a reasonably safe appliance for its servants. This evidence is not of sufficient probative force and weight to sustain an inference that there was a discoverable defect. If the facts be assumed to be as claimed, that the cylinder and the fan unexpectedly started to revolve after the plaintiff had shifted the power belt to the loose pulley and the machine had come to a standstill and that there was an unexpected movement, still this is not sufficient to show that there was a discoverable defect which ought to have been ascertained by the defendant before the accident. It would have been impossible for the defendant to learn of any defect, for there was no evidence of any defect prior to the accident. On the contrary, the evidence is that it had been used for years without any abnormal action, and that so far as discoverable it was in a proper condition of repair and construction. Under these circumstances the rule is that:

"Undisputed proof of freedom of the machine from all discoverable defects, either in construction or repair, effect-

ually overcomes any inference or presumption arising from the happening of the accident, so as to leave no question in that regard for the jury." *Montanye v. Northern E. Mfg. Co.* 127 Wis. 22, 105 N. W. 1043; *Fleming v. Northern T. P. Mill,* 135 Wis. 157, 114 N. W. 841.

From these considerations we are led to the conclusion that the court erred in refusing defendant's request to direct a verdict in its favor upon the ground that there was no evidence tending to show that the defendant negligently furnished an unsafe machine. This disposes of the case, and the other errors assigned need not be considered.

It may be well to call attention to the following cases bearing on the propriety of submitting questions 5 and 6 of the special verdict, as to whether plaintiff knew and appreciated or ought to have appreciated the danger incident to putting his hand into the machine to remove the clogging material, as he did. It appears that he had learned from experience in working in and about the mill and its machines the usual conditions and hazards accompanying the business. He appears to be a man of ordinary intelligence and experience and must be deemed to know the risks incident to open and obvious dangers, such as coming in contact with a running machine like the mixing picker. The danger of injury to an operator from putting his hand into this machine, as plaintiff did, while it is running, is manifestly so open and obvious that an adult of ordinary intelligence and experience will be presumed to have knowledge thereof. It is not a question for determination by a jury. *Holt v. C., M. & St. P. R. Co.* 94 Wis. 596, 69 N. W. 352; *Larsson v. McClure,* 95 Wis. 533, 70 N. W. 662; *Osborne v. Lehigh Valley C. Co.* 97 Wis. 27, 71 N. W. 814.

By the Court.—Judgment reversed, and the cause remanded with directions to dismiss the action.

BRADLEY, Plaintiff in error, vs. THE STATE, Defendant in error.

February 4—February 22, 1910.

Criminal law: Instructions to jury: Oral request: Review: Homicide: Degrees: Heat of passion: Self-defense: Evidence: Quarrelsome disposition.

1. The accused cannot, as a matter of strict legal right, predicate error upon the refusal of the trial court to instruct the jury as orally requested; but the supreme court may, in its discretion, consider the point as raised.
2. Sec. 4354, Stats. (1898),—providing that any person who shall kill another in the heat of passion without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is declared to be justifiable or excusable, shall be deemed guilty of manslaughter in the third degree,—does not apply to a case where the accused justifies the homicide as one committed in self-defense.
3. An instruction to the effect that the law limits the right of self-defense to necessity as it reasonably appears to the defendant at the time, and that in acting upon appearances and in taking the life of his fellowman a person acts at his peril and will not be excused unless the circumstances proven were such as would reasonably cause him to believe his act necessary to save his own life or to save himself from great personal injury, was appropriate to this case and not erroneous.
4. So, also, upon the evidence in this case it was proper to instruct that if defendant was in fault in creating the situation of danger his right of self-defense did not arise until he had done all he could reasonably do to avoid the necessity of killing the deceased in order to protect himself.
5. Evidence that a short time before the killing, while a group of fellow workmen, including the accused and the deceased, were returning to their boarding house, the accused was the aggressor in a quarrel with another member of the party and knocked him down with one hand while holding a revolver in the other, was competent to show the quarrelsome and homicidal disposition of the accused, nearly up to the time of the homicide, toward his workmates.

ERROR to review a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

The plaintiff in error was found guilty of murder in the first degree and sentenced by the circuit court for Kenosha county to confinement at hard labor in the state prison for life. To review this conviction he prosecutes this writ of error.

Calvin Stewart, for the plaintiff in error, cited, besides other cases, *Perkins v. State,* 78 Wis. 551, 47 N. W. 827; *Dillon v. State,* 137 Wis. 655, 119 N. W. 352; *Frank v. State,* 94 Wis. 211, 68 N. W. 657.

For the defendant in error there was a brief by *Robert V. Baker,* district attorney, and by the *Attorney General* and *A. C. Titus,* assistant attorney general, and oral argument by *Mr. Baker.* They cited, among other authorities, *Johnson v. State,* 129 Wis. 146, 108 N. W. 55; *Odette v. State,* 90 Wis. 258, 62 N. W. 1054; *Ryan v. State,* 115 Wis. 488, 92 N. W. 271; *Clifford v. State,* 58 Wis. 477, 17 N. W. 304.

TIMLIN, J. The principal error assigned and argued is that the trial court refused to submit to the jury the question of manslaughter in the third degree as defined by sec. 4354, Stats. (1898). That section provides that:

"Any person who shall kill another in the heat of passion without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is herein declared to be justifiable or excusable, shall be guilty of manslaughter in the third degree."

No request in writing was presented to the court, but, as shown by the bill of exceptions, the counsel for accused stated orally: "Defendant now moves the court to submit to the jury manslaughter in the third degree under sec. 4354 and appropriate instructions on said section." Under the rule of *Cupps v. State,* 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, the accused cannot, as a matter of strict legal right, predicate error upon the refusal of any instruction so requested. But this court may in its discretion consider the point as raised.

An examination of the evidence satisfies us that the request was properly refused. We will not review in detail the testimony of the witnesses to the homicide on the part of the prosecution, but sum it up by saying that it amply justified the conviction of the accused of the crime of murder in the first degree. To meet this the accused submits only his own testimony showing that the deceased, Smith, the gang foreman, Parker, and a man nicknamed "Baldy" were engaged in construction work on an interurban railway in Kenosha county and boarded at the house of Mr. and Mrs. Linstroth. The accused came to this work about June 13, 1906, a stranger, and the homicide occurred shortly after midnight on June 27th following. The night before the homicide the accused with Parker and Smith and some others were down in Kenosha and indulged in some drinking. They left Kenosha shortly before midnight, taking an interurban car for a point from which they could walk over to the boarding house. On the way over the accused assaulted and struck Parker in consequence of an argument, in which he accused Parker, who was his foreman, of "balling him out" for coming late with the team. Contradicting the other witnesses, he testifies he did not draw a revolver on Parker and made no previous threats, direct or indirect, to shoot or kill Smith. He arrived at the boarding house after midnight, aroused Linstroth, and asked if any of the boarders were in. Informed in the negative he went up to the sleeping room where the accused, the deceased, Parker, and Baldy slept. He remained there a very few minutes and came down and said to Linstroth he was going to send Smith in and let him square up what he was talking about. By this he referred to a question asked him by Smith in the morning, which was whether he was boarding on his looks. Smith had never said anything about this subject before to him, but he had heard other talk on this subject. Smith's words were: "You must be boarding on your good looks. You are paying no money."

Accused answered that it was none of his business how he was boarding there. He had prior differences with Smith, but not on this subject. He understood Smith to mean by this inquiry that he was on familiar terms with the woman running the boarding house, and this was the reason he afterward said to Smith that the latter must come and apologize. After leaving the boarding house on the night in question he went down to the stable, stayed a few minutes, and went eastward on the crossroad in the direction from which he knew the deceased, Smith, and the others were approaching. He met them walking toward him, one Gates leading, and, saluting Gates, asked if Smith was there. Smith said, "Yes, I am," and asked what was wanted. Accused told Smith he wanted him to go up to the house and square up that old talk he had been making. Smith said he would see him in hell first. Accused retorted with an insulting epithet, and Smith accused him of having his gun ready and threatened him, and started across the road toward him, and accused backed up five or six feet. Smith kept coming until within five or six feet of accused, and said accused would get what was coming to him; raised one of his arms, as accused thought, for a weapon. The accused then shot Smith three times, killing him instantly. In answer to the question put by his own counsel, "Why did you shoot there, *Mr. Bradley?*" he said: "I shot because I thought I had to protect myself." From sleeping in the same room with Smith he knew that Smith carried a revolver, and a revolver was found in Smith's hip pocket after his death.

On cross-examination it was shown that after the alleged insult in the morning of June 26th he had met Smith at Linstroth's house at dinner and again at supper, and again in the evening going down to Kenosha and returning, but had no conversation with him. He did not ask Smith to apologize at noontime when Mrs. Linstroth was there because he did not intend to say anything to him at all, nor at supper

time for the same reason, although he was thinking about it to a certain extent, but not that he was going to make Smith apologize. He first conceived the idea of forcing Smith to apologize to Mrs. Linstroth about 7 o'clock in the evening preceding the homicide, just before the car upon which they started for Kenosha came up. He did not speak to him about it on the car because that was no place to ask a man such a thing as that—there were too many people around. He wished Smith to apologize to Mrs. Linstroth, but he did not know that Mrs. Linstroth knew anything about the remark made by Smith. He resolved on making Smith apologize because he heard a man named Williams say that Smith had made a remark of a different nature altogether about the accused. He did not wish to wait until morning to have Smith apologize to Mrs. Linstroth because Smith could have gone to Chicago or home and might not come back for a couple of days. Contradicting Linstroth, he said he told the latter he was going to tell Smith to come in and apologize, not that he was going to make him apologize. After leaving the house and going to the barn he went east in the direction from which Smith was approaching because he wanted to see Smith to tell him when he went in there to Linstroth's he could square what he had been talking about. He was not very angry. When he saw Smith move his hand toward his hip pocket he thought Smith was going to shoot him, and he knew what he was doing and thought it was necessary for him to shoot Smith. He thought this right at the time that he would have to shoot him just as he began shooting Smith. He further testified as follows: "Then you didn't shoot Smith because you were angry at him? *A.* No; I didn't shoot him because I was angry at him."

On this testimony of the accused there was nothing to warrant submission to the jury of instructions relative to manslaughter in the third degree under sec. 4354, Stats. (1898). This section is not intended to apply to a case where the ac-

cused justifies the homicide as one committed in self-defense. *Perugi v. State,* 104 Wis. 230, 80 N. W. 593.

The following portion of the charge is excepted to:

"When self-defense is interposed in justification, the first inquiry is as to alleged necessity. No right is to be abused or to be made a cloak for wrongdoing, and therefore the law limits the right of self-defense to necessity as it reasonably appears to the defendant at the time. The taking of human life is of such terrible significance that it cannot be justified by some slight appearance of danger. The person doing the shooting, in acting upon appearances and in taking the life of his fellowman, so acts at his peril, and will not be excused unless the circumstances proven were such as would reasonably cause him to believe his act necessary to save his own life or to save himself from great personal injury. The reasonableness of the apprehension is to be judged from the standpoint of the defendant at the time, and not from that of the jury now."

The foregoing instruction was appropriate to the instant case and not erroneous. The court further instructed the jury as follows:

"If the defendant was in fault in creating the situation of danger, his right of self-defense does not arise until he shall have done all that he could reasonably have done to avoid the necessity of killing Smith in order to protect himself."

There is evidence from which the jury would be warranted in finding that the accused was in fault in creating the situation of danger, and the instruction is approved.

At the close of the state's case the defendant moved the court to exclude from the consideration of the jury all the evidence bearing upon the controversy and trouble with Parker as prejudicial, tending to raise collateral issues, incompetent, and irrelevant in this case. The court denied the motion. This testimony was of the following nature: The accused, on the return from Kenosha and after the party left the interurban car for the boarding house, got into a quarrel with Parker in which the accused was the aggressor.

He accused Parker of having a knife. Parker talked in a conciliatory manner and held up his hands to show that he had no knife, when the accused, presenting or holding a revolver in one hand, knocked Parker down with a blow from the other hand. It does not appear whether Smith saw this affray or not, but he was one of the same group of men returning to the same boarding house, and it might be inferred that he knew of it. The testimony was competent to show the quarrelsome and homicidal disposition of the accused nearly up to the time of the homicide toward his workmates, members of this same group on this return trip. *Kernan v. State,* 65 Md. 253, 4 Atl. 124.

Other errors are assigned in the admission and exclusion of evidence. We have carefully considered them, but they are not, in our opinion, of sufficient importance to justify separate discussion. We find no error in the proceedings prejudicial to the accused, and the judgment of conviction must be affirmed.

By the Court.—Judgment affirmed.

VAN HALTREN, Plaintiff in error, vs. THE STATE, Defendant in error.

February 4—February 22, 1910.

Criminal law: Appeal: Sufficiency of evidence.

The verdict in a criminal case will not be disturbed on appeal if there is any credible evidence which in any reasonable view supports it.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Affirmed.*

For the plaintiff in error there was a brief by *W. J. Kershaw,* attorney, and *H. L. Eaton,* of counsel, and oral argument by *Mr. Eaton.*

For the defendant in error the cause was submitted on the brief of *A. C. Backus,* district attorney, and *Norman L. Baker,* assistant, and the *Attorney General,* of counsel.

BARNES, J. The plaintiff in error was convicted of the crime of larceny, and from a judgment entered upon the verdict of guilty he prosecutes a writ of error in this court. The sole ground relied upon for a reversal of such judgment is that the evidence was not sufficient to support the verdict. "If there is any credible evidence which in any reasonable view supports a verdict it cannot be disturbed on appeal." *Lam Yee v. State,* 132 Wis. 527, 529, 112 N. W. 425, and cases cited. A careful examination of the testimony convinces us that there is sufficient evidence in the record to support the verdict, having in mind the rule quoted. No useful purpose would be served by summarizing such evidence in this opinion.

By the Court.—Judgment affirmed.

FUGINA and another, Appellants, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

January 14—March 15, 1910.

Navigable waters: Opening of drawbridges: Negligence: Rules of War Department: Publication: Evidence: Custom.

1. The rules and regulations concerning the opening of drawbridges, authorized to be made by the secretary of war under the River and Harbor Act of August 18, 1894, and required to be published in order to have the force of law, cannot be held, as a matter of law, to have been published, upon evidence of mere delivery to a government officer of a limited number of copies with instructions to deliver them to the commanding officers of vessels touching at a certain port, when it affirmatively appears that neither the captain of the vessel in question nor other captains plying those waters had any notice of such rules.

2. In the absence of publication of rules and regulations of the War Department bearing upon the subject, it is competent to prove a custom, existing for seven years, to the effect that an approaching boat blew its whistle only when a drawbridge was closed, as a signal to open it, but not when the bridge was already open.

MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Buffalo county: E. W. HELMS, Circuit Judge. *Reversed.*

This action was brought to recover damages for injuries to appellants' steamboat caused by the swinging against it of the draw span in respondent's bridge across the Mississippi river at Winona, Minnesota. It is alleged in the complaint that while the boat was passing through the open draw respondent negligently swung the draw span against the boat. The answer admits ownership and operation of the bridge by respondent, denies negligence, and alleges that the injury was caused by the negligence of the appellants. After the evidence was in, the court directed a verdict in favor of the respondent. After denial of a motion for a new trial, judgment was entered in favor of the respondent, from which this appeal was taken.

For the appellants there was a brief by *M. L. Fugina* and *Webber & Lees,* and oral argument by *Mr. E. L. Lees* and *Mr. Fugina.*

William G. Wheeler, for the respondent.

The following opinion was filed March 15, 1910:

KERWIN, J. The errors assigned may be classified under three heads: (1) in directing a verdict for defendant; (2) in excluding evidence offered by appellants; and (3) in refusing a new trial.

The evidence tends to prove that on September 8, 1908, the appellants' steamboat E. Rutledge, under the command of Wm. H. Wier, a duly licensed master and pilot on the Mississippi river, reached Winona at 2 p. m. and landed at

the public levee on the south bank of the river. The river at this point runs east and is spanned west of the levee by two bridges, one a high wagon bridge, the other the respondent's railway bridge, which is a drawbridge, the draw being located on the south or Minnesota side of the river. There are two channels through the draw, one on either side of the pivot pier on which the draw span revolves. On the north side of the south channel there is a pier 360 feet long which is built of piling driven into the river, forming a long box filled with stone and extending longitudinally up and down the river, in the center of which is the pivot pier upon which the draw span swings. The channel on each side of the pier is about 150 feet wide. When the Rutledge landed at the levee a steamboat called the La Crosse was lying about 300 feet below. The Rutledge started up river to Fountain City, but shortly before leaving the levee the La Crosse blew her whistle as a signal to open the draw, which was then closed, but which immediately opened to its full width, and was so open when the Rutledge and La Crosse proceeded up stream. The La Crosse pulled out first and was immediately followed by the Rutledge, the two boats being about 200 feet apart as they went into the draw with the La Crosse in the lead, both boats taking the south channel through the draw. Before the La Crosse had cleared the draw the master of the Rutledge observed the draw span swinging off the pier toward his boat. At this time his boat was about seventy-five feet below the pier and running at about nine miles an hour. Immediately upon observing the movement of the draw span signals were given to stop the boat and reverse the motion of her wheel, thereby reducing the speed to about three miles an hour; but before she could be stopped the bridge struck her on the right-hand side, knocking down the smokestacks and pilot house and causing other injury. When the draw first began to swing the stern of the La Crosse was about opposite the pivot pier, the La Crosse then being about half way

through the draw. No warning signal was given by blowing the whistle on the engine house on the draw. About thirty feet in length of the Rutledge had passed the bridge before the collision. The collision occurred about 3 p. m. of a perfectly clear, bright day. From the time the Rutledge left the levee until the collision the engine house on the draw span was in plain sight. No signal was given by the engineer on the draw when the draw span began to swing.

The defendant put in evidence sec. 5 of the River and Harbor Act of August 18, 1894 (ch. 299, 28 U. S. Stats. at Large, 362, U. S. Comp. Stats. 1901, p. 3538), which provides for the opening of drawbridges across navigable rivers of the United States and authorizes the secretary of war to make such rules as in his opinion public interests require, and further provides that when such rules and regulations are made and published they shall have the force of law. Also regulations 1 and 2, passed in pursuance thereof, as follows, were offered:

"1. Whenever a steamboat is to be passed through the channel at any drawbridge, the officer or person in charge thereof shall cause to be sounded, when said boat shall be at a distance not less than one half mile, but within signaling distance from said bridge, one long blast of a steam whistle.

"2. When a steamboat is to leave a landing one half mile or less from a drawbridge, with the intention to pass through the bridge draw, the officer or person in charge of said steamboat shall cause to be sounded the required signal, a sufficient time before leaving the landing to allow the bridge to be opened in time."

These rules were made by the secretary of war May 31, 1901. No proof was made of the publication of these rules or regulations except that some twenty copies were sent to the United States engineer in charge of improvements on the Mississippi river from Winona to the mouth of the Wisconsin river with instructions to give them to the commanding officers of every vessel that touched at La Crosse, and that

he distributed these copies to different boats, but that he had no recollection of delivering a copy to Capt. Wier of the Rutledge or posting a copy on the Rutledge, and that the Rutledge entered the upper waters of the Mississippi before 1901. Captains De Mars, Wier, Cassidy, and *Fugina,* all running boats on the upper Mississippi since 1901, testified that they never saw nor received the rules or regulations referred to. It also appears from the evidence that the following pilot rules governing pilots on the Mississippi river were in force at the time of the accident, viz.:

"Rule 12. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Also the amended pilot rule, adopted January, 1907: "Unnecessary sounding of the steam whistle is prohibited within any harbor limits of the United States." The foregoing rules were offered in evidence by appellants and excluded. The appellants also offered to prove that no copy of the rules or regulations was posted on the Rutledge or on any other steamboat upon which the witness had been since May 31, 1901, which evidence was excluded. The court below seems to have rested its opinion in direction of a verdict upon the idea that the respondent had the right to rely upon the regulations respecting the opening of drawbridges, hence in the absence of a signal by the Rutledge was under no duty of observation as to whether the Rutledge was approaching, and that the appellants had no right to run their boat up river assuming that the draw would be left open. This proposition, of course, is based upon the assumption that the rules were regularly published, because, until they were, they had no force under the act of Congress heretofore referred to, which provides that "such rules and regulations, when so made and published, shall have the force of law." So we at

once approach the question of whether the evidence was sufficient to establish as a matter of law the publication of the rules and regulations upon which the respondent relies. The act clearly contemplates a publication, and no attempt to prove publication was made, except as before stated, and there is evidence that neither the appellants nor the captain in charge ever received a copy or had any notice of the rules. There is also evidence that other captains on the river never saw or received the rules.

Counsel for appellants calls our attention to sec. 4405, R. S. of U. S. (U. S. Comp. Stats. 1901, p. 3017) and the following rule made in pursuance thereof:

"Each master and pilot of steam vessels wherever employed shall when receiving his license, either original or renewal, be furnished with a pamphlet copy of the rules and regulations governing pilots, and of the statutes upon which such rules are made applicable upon the waters in which their licenses are intended to be used as stated in the body thereof."

Also to sec. 4412, R. S. of U. S. (U. S. Comp. Stats. 1901, p. 3020), providing that two copies of passing rules to be observed by vessels shall be furnished to each vessel and be kept posted in a conspicuous place thereon, and says that rules 1 and 2, hereinbefore referred to, are designed to govern the action of pilots on steam vessels as well as bridge tenders on drawbridges, and that in order that these rules be published to pilots and masters they should be furnished to them in the same manner as other government rules which describe their duties in navigating public waters. Our attention has also been called to the United States statutes which limit captains' licenses to five years, and provide for renewal, and it is argued that this, in connection with the rule that a copy of rules shall be furnished at time of issue of license or renewal, and the fact that the captain of the Rutledge was on this river from 1901, show he must have had either original

or renewal license, and should have known of rules and have received them if in existence or published. We have been cited to no authority, and are aware of none, which makes the mere delivery to the government officer in charge, as was done in this case, of a limited number of copies of the rules with instructions to deliver them to the commanding officers of vessels touching at La Crosse, a publication within the meaning of the act of Congress, which requires rules to be made and published. So we are therefore of the opinion that on such proof as the record here presents it cannot be said as matter of law that there was a publication of the rules, when it affirmatively appears that neither the captain of the Rutledge nor other captains plying the river had any notice of such rules; but we make this ruling without prejudice to the respondent's right to litigate and have determined upon another trial the question as to whether there was a publication of the rules.

The appellants further offered to prove that there was a custom existing upon the river for a period of seven years before the accident to the effect that, when a bridge was open, the approaching boat did not blow its whistle, and only blew it when the bridge was closed as a signal to open it. The contention on the part of the appellants is that it was competent to show this custom, especially since the rules had not been published and were not known or acted upon, and further, that the rules are ambiguous, and that the ambiguity is as to whether or not the whistle should be blown only when the bridge is closed. Rule 2 heretofore recited is the one bearing upon the case in hand and requires the signal to be sounded "a sufficient time before leaving the landing to allow the bridge to be opened in time," and pilot rule No. 12 heretofore quoted and the amendment thereto adopted in January, 1901. But from the view we take of the case it is unnecessary to decide, and we do not decide, whether the rules are ambiguous, but rest the disposition of the case upon

the competency of the evidence of custom in view of the fact that sufficient evidence was not offered to establish as matter of law publication of the rules. Whether such evidence of custom would be admissible in case publication were established we need not and do not determine. It is clear, in the absence of publication of the rules so as to be binding upon the appellants, that the question of defendant's negligence as well as the plaintiffs' contributory negligence were questions for the jury, and the court, therefore, was in error in directing a verdict. It follows that a new trial should have been granted.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

The following opinion was filed April 8, 1910:

MARSHALL, J. (*dissenting*). I understand the court decides there was not sufficient proof of publication of the rule alleged to have been violated, to render it valid as a matter of law, and, on that account, the cause was improperly taken from the jury. That is, if at the time of the accident the rule was in force requiring the bridge tender to be signaled by the person in charge of any boat desiring to pass through the draw, when the boat is at least one half mile away, then actionable negligence was not established.

There is no question but what the rule was made and copies sent to the proper local officers for distribution, nor but what that occurred some eight years before the accident, nor but what the rule had been customarily, at least, observed. It was obeyed by the person in charge of the boat which preceded the Rutledge. There is no question but what, if the rule had been published, it had the force of law just the same as if incorporated into an act of Congress, and was as binding on those who actually knew of it as those who did not.

I cannot understand the significance of the observations

in the opinion, that the captain of the Rutledge and some other captains did not know of the rule and that it was not posted up on the boat. It seems such observations, if intended to indicate that the rule, if published at all, was not law as regards those who did not have actual knowledge thereof, or that evidence that some did not have knowledge of the same, was proof, negative of publication, they are erroneous and, in any event, misleading. Truly, the effect of publication must be the same in this case as in any other where an enactment depends upon such a circumstance for validity. It would not be thought, for a moment, that one could raise a controversy as to whether an act of the legislature had been efficiently published by proving that many persons intended to be affected thereby had never seen or heard of it. Neither would it be thought, in case of a legislative enactment being enforceable as to one person, it would not be as to another, or that knowledge of either would have any bearing on the question. I do not see why the rule, which, contingent upon publication, was a law, stands upon any different basis than any other law, or how the evidence, given so much significance to exempt the captain of the Rutledge from conforming to the rule, had any relevancy.

Can it be that whether a rule, designed to have the force of law upon the navigable waters of the country, is effective or not, depends upon whether the local officers of the United States in close touch with river pilots and charged with administrative duties in respect to navigable waters, do their duty as regards delivering copies to the pilots, or the proprietors of boats do their duty as to posting up rules thereon? If so, a very confused situation exists. In the circumstances of this case, what might be actionable negligence as to one bridge tender might not as to another, and what might be actionable negligence as to one boat might not as to another. So each bridge tender would have to shape his course, at all times, as if no such rule existed, since it would be impossible for him to know whether a pilot was under the law or not.

Again, can it be that failure to post up regulation rules on a boat, as required by law, which would necessarily be the failure of the proprietor or his agent, or both, or the failure of the pilot to obtain a copy of the rules, which it was his duty to do, can affect their efficiency as to him? These and other considerations occur to my mind as reasons why the decision is wrong.

The act of Congress did not prescribe any method for publishing the rules. There is no general federal act on the question. The law in providing that the rules shall, when published, have the force of law, under the circumstances leaves it to the discretion of the head of the War Department to publish rules in any reasonable way he sees fit. He evidently adopted, in this case, the method of printing the rule and sending copies to the local administrative officers in touch with the boatmen affected, expecting that such officers would use due diligence to bring the rule to the attention of pilots, and that each pilot would be diligent to discover all rules designed to govern his conduct, and that he and his employer would see that such rules were properly posted. Some such method of publication probably has been followed ever since we had navigation rules in this country emanating from the War Department. No record is found anywhere of its having been held ineffective. It seems to me it is a reasonable, and, therefore, efficient method, and that neither negligence of the local officers nor the proprietor of a boat, nor the pilot in charge, has anything to do with whether the rule is or is not law.

In my opinion, the act of sending copies of the rules to the local officers with directions, express or implied, to bring the same to the attention of persons intended to be affected, was a sufficient publication in contemplation of the act of Congress. Moreover, in my opinion, after such a rule has been in existence for so long a time as eight years and has been in force, in contemplation of the War Department, for that period, as in this case, and is conformed to by the bridge

tenders on the river, it should be presumed to have been duly published, especially so far as necessary to protect a bridge tender and his employer from liability for negligence. The burden of proof should not be cast upon the person who relies upon the rule to prove publication, but on the one who challenges its validity to prove the contrary, otherwise the rule is liable to be the law in one case and not in another, and in one jurisdiction and not in another. Such a situation as to the navigation laws would be very disastrous to persons and property.

KILEY, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

February 22—March 15, 1910.

(1) *Law of the case: Decision on former appeal.* (2–4) *Constitutional law: Due process of law: Equal protection of the laws: Classification for legislative purposes: Railway carriers: Liability for injuries to employees.*

1. A decision on a former appeal that a statute does not violate constitutional provisions is the law of the case.
2. Laws governing railway carriers as a class in their relations with their employees, and subjecting them to liabilities and obligations greater than those imposed upon other employers of labor, are based upon just and proper classification and are not in violation of the XIVth amendment to the federal constitution.
3. It is not essential to the validity of such laws that their operation should be confined to employees engaged in moving trains.
4. Exemption of "employees working in shops or offices" from the operation of a law imposing upon railway carriers peculiar liabilities to all their other employees, is not so unreasonable a subclassification that it can be held to be beyond the power of the legislature.

MARSHALL, J., concurs upon the sole ground that the court is bound by its former decision, from which he dissented.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Greene, Fairchild, North & Parker* and *Chas. E. Vroman,* attorneys, and *C. H. Van Alstine,* of counsel, and oral argument by *Mr. Van Alstine.*

For the respondent there was a brief by *Minahan & Minahan,* and oral argument by *V. I. Minahan.*

WINSLOW, C. J. This is an action against a railway company brought by one of its employees to recover damages for the loss of his eye, occasioned by the negligent act of his co-employees while they were engaged in constructing a wire fence along the right of way. A general demurrer to the complaint was overruled, and that ruling affirmed by this court in 138 Wis. 215, 119 N. W. 309, 120 N. W. 756. Since that decision the action has been tried before a jury and a special verdict returned finding that (1) the staple which injured plaintiff's eye was thrown out of the post by reason of the wire being pulled or moved by plaintiff's co-employee, one Charapata; (2) a man of ordinary intelligence and prudence in Charapata's position ought to have reasonably anticipated that, by pulling or moving said wire without notifying plaintiff that he was about to do so, some such injury would result to plaintiff; (3) Charapata was guilty of negligence in so moving or pulling said wire without first notifying the plaintiff that he was about to do so; (4) a man in plaintiff's position should not have reasonably anticipated that a staple might be thrown out and cause him injury by the handling of the wire by the man next to him as the work was ordinarily carried on; (5) plaintiff's damages were $2,000.

The defendant, both by answer and by motion made at the opening of the trial, expressly made the contention that it was not liable, because ch. 254 of the Laws of Wisconsin for 1907, under which the action is brought, violates the XIVth amendment to the constitution of the United States, in that

it deprives the defendant of property without due process of law and denies to the defendant the equal protection of the laws. After the rendition of the verdict the defendant moved for judgment in its favor notwithstanding the verdict, also that the court set aside the affirmative answers to the first four questions of the verdict and substitute negative answers therefor and render judgment for the defendant thereon, all of which motions being denied, judgment for the plaintiff was rendered on the verdict, and the defendant appeals.

As will appear from the foregoing statement, the jury upon trial of the action found exactly the state of facts alleged in the complaint, and the defendant upon this appeal makes no claim of error save the claim that ch. 254 of the Laws of 1907 is void because it violates the provisions of the XIVth amendment to the federal constitution. The same claim was fully argued, considered, and rejected upon the former appeal, and the result is conclusive not only upon the trial court but upon this court. Whether right or not, the conclusion then reached formed the law of this case, and when the same question was again presented the court below could rightly do but one thing, *i. e.* follow the former decision. Any other holding would have been error. *Ellis v. N. P. R. Co.* 80 Wis. 459, 50 N. W. 397; *Keystone L. Co. v. Kolman,* 103 Wis. 300, 79 N. W. 224. Such being the case, it is obvious that no error can now be predicated upon the action of the trial court. Perhaps we might well affirm the judgment upon the doctrine of *res adjudicata* without further remark; but, inasmuch as another case involving the same question has been submitted at the present assignment, we have re-examined the questions raised and deem it proper to state again our conclusions upon the federal questions involved.

The fundamental question is the question of classification. If the law can only be viewed as a classification of laborers

or employees based upon the peculiar risks which men who operate trains necessarily meet and which are not met by men who are employed by firms or corporations engaged in other occupations, then it may be admitted for the sake of the argument that the classification attempted in this law is indefensible, because in that case it should have been confined to those employees who meet such peculiar risks, namely, those engaged in or about the operation of trains, while the law (with two exceptions to be noticed later) in fact includes all classes of employees, many of whom meet no peculiar risk, but only the same risks which the employees of ordinary business concerns are daily meeting. It is not denied that a number of courts have condemned similar laws upon this very ground, notably the courts of Iowa and Minnesota, and it may be admitted that such was, for a time at least, the prevailing doctrine. It is to be noted that this court in *Ditberner v. C., M. & St. P. R. Co.* 47 Wis. 138, 2 N. W. 69, repudiated this doctrine and upheld a law similar to the present law, in that it covered *all* employees, on the ground that it was a valid exercise of the reserve power given to the legislature to alter or repeal corporate charters. However, this court took a different view of the present statute when this case was here upon demurrer. It viewed the law as a law classifying railway common carriers, regulating their relations with their employees and subjecting them to peculiar obligations and duties towards such employees. The law was sustained on the ground that it was entirely proper, and in fact a universally recognized principle, that railway carriers should be, and generally must be, subjected to special legislation affecting them alone; that this is so, not only on account of the unique dangers involved in the business, but as well on account of its public nature and the vast importance to the public at large of the careful conduct of the business, not merely in the handling of trains, but in the performance of well-nigh every act which an employee performs

which is necessary to the carrying on of the business. Railway carriers from their very nature must, in large measure, be governed by laws peculiar to themselves, and such has been the character of railway legislation since the business began. The question is whether the regulation of their relations with their employees is within this general principle or not.

It was noticed in one of the opinions upon the former appeal that while the federal act which attempted to abolish the co-employee doctrine as to interstate carriers was held void in the *Employers' Liability Cases,* 207 U. S. 463, 28 Sup. Ct. 141, because it covered intrastate commerce, still it was broadly intimated in the opinion that, if the act applied to the District of Columbia and the territories only, it could not be questioned. This act attempted to impose on every common carrier a liability to *any* employee for damages resulting from the negligence of any of its officers, agents, or employees. Thus it will be seen that it applied in terms not merely to employees who are moving trains, but to all employees, and thus seems to be subject to the same objection as to improper classification which is now made to the Wisconsin statute.

Since the former opinion in the present case was rendered, the question of the constitutionality of the federal act as applied to the District of Columbia and the territories has been brought before the United States supreme court in *El Paso & N. E. R. Co. v. Gutierrez,* 215 U. S. 87, 30 Sup. Ct. 21, and the law has been held constitutional. It is true that the point now raised is not discussed in the opinion, but the decision certainly stands as a direct holding that a law making a common carrier liable for injuries to *any* employee resulting from the negligence of a co-employee is a valid law. While the XIVth amendment only inhibits states from depriving persons of life, liberty, or property without due process of law, the same inhibition is placed upon the United

States by the Vth amendment, and both state and national legislatures are governed by the principle that there can be no discrimination in the laws except such as is based upon just and proper classification. Without attempting again to review the authorities which were reviewed upon the former appeal, we are content to rest this branch of the case upon the principle before stated, namely, that railway carriers, on account of the public character of their business, may properly be classified so far as their relations with their employees are concerned, whether such employees are moving trains or not, and may be made subject to liabilities and obligations greater than those imposed upon other employers of labor.

As to the provision exempting shop and office employees from the operations of the act, a different question arises. This is undoubtedly classification, or rather subclassification, of employees. Subclassification of a class is entirely permissible, but, like all other classification, it must be based upon real distinctions germane to the purpose of the law and suggesting at least the propriety of substantial difference in legislation. On the other hand, the question whether there is room or necessity for classification is one resting primarily with the legislature, and no court is justified in declaring classification baseless unless it can say without doubt that no one could reasonably conclude that there is any substantial difference justifying different legislative treatment. *State v. Evans,* 130 Wis. 381, 110 N. W. 241; *Servonitz v. State,* 133 Wis. 231, 113 N. W. 277. Nor is classification to be condemned by the courts because the situation of certain individuals in one class may not differ materially from the situation of certain individuals in another class. Such is frequently the case. It is the class, considered broadly as a class, which must possess the distinguishing differences of situation calling for different legislation, not every individual in the class. *State v. Evans, supra.*

Bearing these well-established rules in mind, we still find

ourselves unable to say that the classification which exempts shop and office employees from the provisions of the law passes the bounds of reason. Speaking generally of the shop and office employees as a class, they are in less danger from the negligence of co-employees, and perform duties less directly and vitally connected with the public safety, than train employees and track repairers, who constitute a very large percentage of the other class, and we cannot say that the differences are not such as would justify a reasonable mind in concluding that they suggest the propriety of substantial difference in legislative treatment.

We deem it unnecessary to again discuss any other objections made to the law. We are content to leave all other objections as they were left by the former discussion.

By the Court.—Judgment affirmed.

MARSHALL, J. I must concur in the result of this case but solely upon the ground that the court is bound by its former decision, from which I dissented.

It is understood that the case was presented anew, primarily, for the purpose of obtaining a final judgment, supported by an opinion, making unmistakable the precise grounds for the court's position, to the end that such grounds may clearly appear on review in the federal supreme court. I must again call attention to the fact that the statement in the opinion of the court that in *Ditberner v. C., M. & St. P. R. Co.* 47 Wis. 138, 2 N. W. 69, a law similar to the one now involved, "was held not obnoxious to the constitutional provision prohibiting unequal and partial legislation on general subjects," is not warranted as it seems to me. If I can read the *Ditberner Case* understandingly, it did not pass on the question suggested. The court merely refused to approve, presently, what was said on such subject by the Iowa court in *Deppe v. C., R. I. & P. R. Co.* 36 Iowa, 52, and then grounded the decision on the reserved power to amend corporate charters. The court in this case did not base its de-

cision on that theory but took up and decided what the court, in the *Ditberner Case,* was pleased to characterize as covered by mere *obiter* remarks in the Iowa case. I assume that the court felt impelled to do that because the basis for the decision in the *Ditberner Case* was wholly illegitimate, the law applying, as it did by its terms, to all corporations doing business in this state; those subject to the reserved power to amend corporate charters and those in respect to which such power could have no application. The legislature did not, in enacting the law, then consider, or in enacting the law now involved, have any thought of, amending corporate charters. Both laws are mere police regulations.

I must also again call attention to the fact that the doctrine of the Iowa case, proclaimed in the opinion in the *Ditberner Case* to be merely *obiter* and said in the court's opinion in this case to have been rejected in the *Ditberner Case,* was in fact the very one upon which the Iowa case turned as stated in my former opinion, while it was not involved at all, as the court viewed the matter, in the *Ditberner Case.*

Again, so far is the doctrine of the Iowa case from being *obiter,* that it was followed subsequently by the Iowa court as having been the basis for the decision in the case where it was first declared, and so far is it from being out of harmony with *Mo. Pac. R. Co. v. Mackey,* 127 U. S. 205, 8 Sup. Ct. 1161; *Mo. Pac. R. Co. v. Haley,* 25 Kan. 35; and *Lavallee v. St. P., M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974, and similar cases, that it will be found upon investigation that all tie to it as the only constitutional basis for upholding the law. The Iowa decision and the Minnesota decisions, confessed in the opinion of the court on the first appeal, and affirmed now, to condemn the law in question, and substantially every adjudication in this country, so far as I have been able to discover, tie back to the doctrine of the early Iowa case. It seems to me that I reduced that to a demonstration in my opinion upon the former appeal.

The language of the Iowa court is this, referring to the

law under consideration: "If it were to be considered as to apply to all persons in the employ of railroad corporations without regard to the nature of the service it would be a clear case of class legislation, hence would be unconstitutional," runs through all the decisions, state and national, as I read them, till we come to the decision in this case. There, it seems, for the first time it is held that classification and legislation to protect against the results of danger of personal injuries with regard to mere employers of the persons to be benefited, the special classification, at that, including many groups not incurring any extraordinary hazard at all by reason of the kind of their employment and excluding others who do, is legitimate. Can that stand the test of the federal constitution on any one of several points that might be mentioned? That is the question. I do not think so.

I cannot add to my analysis on the former appeal of the various adjudications showing that they all go back to and support the doctrine of *Deppe v. C., R. I. & P. R. Co., supra.* What is there said in that respect I find no reason to modify after an investigation of the subject, by anything said in *Employers' Liability Cases,* 207 U. S. 463, 28 Sup. Ct. 141. True, the federal supreme court there said, that if the act applied only to the District of Columbia and the territories, where the power of Congress to legislate is plenary; not dependent as to the subject in hand on the interstate commerce clause of the constitution, the act could not be questioned. But it should not be thought from that, it seems, that the validity of such an act as the one before us, if so restricted, could not be questioned.

The objectionable feature of the act of 1907 is not in the national act. Whereas the former arbitrarily classifies employers, giving all their employees special benefits, with the exception of one class, indicating, clearly, that the classification was not on the ground of extraordinary hazard of the employment, but on account of employment merely by a par-

ticular class of corporations, the latter restricted the benefits of the act to those employees who are engaged in the zone of extraordinary hazard. The one extends to all employees of any railway company, except those working in shops and offices, the other makes, as beneficiaries of the act, every employee of any common carrier of a specified class, or his personal representative for the benefit of his widow and children, etc., in case of any such employee being damaged as the result of "the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works." Notwithstanding the general reference to co-employee negligence such reference is in such close connection with the latter part of the quoted language as to plainly suggest hazard of railroading instead of mere kind of employment as the basis of classification, when the whole is read in the light of *Deppe v. C., R. I. & P. R. Co., supra,* construing the Iowa act, which feature is not found plainly, if at all, in our act of 1907. The particular feature, it seems, is more prominent in the federal than in the Iowa act which has been the model for nearly all of the acts which have been reviewed by the courts. That the federal court did not intend to go further than the Iowa rule is apparent in the fact that, in the brief reference to the merits of the case in hand as to whether the law was constitutional, *Mo. Pac. R. Co. v. Mackey,* 127 U. S. 205, 8 Sup. Ct. 1161, was referred to as the test to be applied. The reference to that case, in effect, referred to and approved the Kansas case and also *Deppe v. C., R. I. & P. R. Co.,* which the Kansas court cited, holding that it was bound thereby since the law was adopted from Iowa with the Iowa construction. It further, in effect, cited with approval the Minnesota and other cases, all tying back to *Deppe v. C., R. I. & P. R. Co.,* as demonstrated, I think, in my former opinion.

El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21, now cited by the court as having declared the law to be that which it was very broadly intimated it might be in the *Employers' Liability Cases,* goes no further than to convert such broad intimation into judicial declaration. That is, when rightly considered, as I think, that the doctrine of *Deppe v. C., R. I. & P. R. Co., supra,* which the court here rejects, is the proper test to be applied to our act of 1907.

So it seems we come back to the conclusion, as stated in my former opinion, that the doctrine of the Iowa and Minnesota cases, conceded to condemn the act of 1907, runs through all the adjudications, state and national, on the subject. The court ties its conclusions to a superstructure with the substructure removed, the former being delusive without being contemplated from the viewpoint of the latter, resulting in the position of this court, as it seems to me, being illogical and entirely novel in the jurisprudence of this country.

It is hoped that the plain statement of views contained in the various opinions in this case, will result in the real logic of *Mo. Pac. R. Co. v. Mackey, supra,* and the two recent federal cases to which I have referred, being made unmistakable to all. It seems to be conceded that if they go no further than *Deppe v. C., R. I. & P. R. Co.,* then the act in question is unconstitutional under several clauses of the national fundamental law, because, as said, to put "all persons in the employ of railroad corporations without regard to the nature of their service," in one general group, for the purpose of special protection against loss by reason of personal injuries received in the course of their employment "would be a clear case of class legislation, hence would be unconstitutional, and clearly so."

LADD, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

February 22—March 15, 1910.

Kiley v. C., M. & St. P. R. Co. 138 Wis. 215, 142 Wis. 154, followed.

APPEAL from a judgment of the circuit court for Rusk county: MARTIN L. LUECK, Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *John L. Erdall,* attorney, and *A. H. Bright,* of counsel, and for the respondent on that of *Samuel A. Anderson* and *W. H. Stafford.*

WINSLOW, C. J. This is an action brought against a railroad company by one of its employees to recover for injuries caused by the negligence of his co-employee. Trial by jury was waived. The facts were stipulated, and were in effect that the plaintiff was working for the defendant as a craneman upon a steam shovel being operated by defendant at Osceola, Wisconsin, loading cars with dirt to be used in ballasting its roadbed, and that he was injured solely by the negligent act of his co-employee, the engineer, in moving his lever too far to the right; that the duties which the plaintiff and the engineer were performing were the same in character as those ordinarily performed by engineers and cranemen on steam shovels in making excavations for ordinary business purposes, and the risks and hazards were no different from those involved in operating steam shovels for individuals or firms at places entirely disconnected from the railway business; and that the act which resulted in the injury was in no manner connected with the transportation business of the defendant.

The defendant, both by answer and by request to the court to make findings, insisted that ch. 254, Laws of 1907 (under

which plaintiff must recover, if at all), is unconstitutional because it violates secs. 1, 5, 9, 13, and 22, art. I, and sec. 2, art. VII, of the constitution of Wisconsin, as well as sec. 1 of the XIVth amendment of the federal constitution. The court, however, ruled that the act in question was valid and entered judgment for the plaintiff for the stipulated damages, from which judgment the defendant appeals.

In this court the appellant contends that ch. 254 aforesaid is void because it offends against the XIVth amendment to the federal constitution in that (1) it denies to railroad companies the equal protection of the law; (2) it denies to shop and office employees the equal protection of the law; (3) it denies to employees of other persons the equal protection of the law; (4) it deprives railroad companies of their property without due process of law; (5) it deprives the employees included in the act of their property without due process of law.

These contentions have all been decided adversely to the defendant in the *Kiley Case,* which was before this court upon demurrer to the complaint in 138 Wis. 215, 119 N. W. 309, 120 N. W. 756, and which is decided upon the merits herewith (*ante,* p. 154, 125 N. W. 464). Following those decisions, the present judgment must necessarily be affirmed.

By the Court.—Judgment affirmed.

MARSHALL, J. My views in this case are sufficiently indicated in my opinion in *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, at page 232 (119 N. W. 309, 316), and my opinion in the same case on the second appeal, decided herewith (*ante,* p. 154, 125 N. W. 464). I refer to those opinions and abstain from rediscussing the matter.

BLAHNIK, Administratrix, Appellant, vs. CENTRAL COAL COMPANY, Respondent.

February 22—March 15, 1910.

Master and servant: Death: Unguarded gearing: Contributory negligence.

An oiler, familiar with the whole situation, who knew the danger of oiling the hoisting machinery in question when it was in operation if the guard railing was not in place, and had been forbidden to go, under such circumstances, through a narrow passage between revolving drums and gears, and who could easily have replaced the guard (which had been temporarily removed) or could have had the machinery stopped for oiling, but neglected to take either of such precautions and was caught by the gears and killed, was as a matter of law guilty of contributory negligence which was the proximate cause of his death.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Action to recover compensation for the death of plaintiff's intestate, alleged to have been caused by actionable negligence of defendant.

Plaintiff's claim as stated in the complaint is, that the deceased was killed, while with due care in the performance of his duty as an employee of the defendant, endeavoring to oil the bearings of a machine composed of revolving drums and gears, by being caught and dragged into the gears and between the drums, the cause thereof being, first, that the machinery was unsafe, in that the drums and gears were unguarded, in which condition when in motion they were dangerous to the deceased in the ordinary performance of his duty; second, that his working place was unsafe because of an insufficiency of space between the sides of the building and its projections on one side and the revolving drums and gears on the other; third, that the working place was unsafe, in that the floor where deceased had to work, was so incumbered

with machinery that it was difficult for him to obtain a safe and solid resting place for his feet.

The contrivance into which the deceased was drawn is described in the complaint, as follows: Two rapidly revolving and unguarded drums and unguarded gears, located on the floor of the room so as to be dangerous to employees. There were two drums, each over three feet in diameter, the two being placed horizontally on the floor parallel to each other with a narrow space between them. Close to the end of each drum was a cogwheel of about the diameter of the drum, each engaging a small cogwheel at the side by which power was transferred to the large wheels and companion drums. All revolved rapidly when the machinery was working. The operation of oiling required the oiler to go, at times, when the machinery was working, in such close proximity thereto as to render probable his clothing being caught or his slipping and falling against the gears, in the absence of any guard or protection in that regard, which guard could easily have been provided but, through defendant's negligence, was not.

The answer put in issue the allegations of negligence on defendant's part, and alleged that the machinery could readily have been oiled while in motion and that it was in fact properly guarded, and further that the deceased was injured through his own contributory negligence.

The evidence was to the effect that the machinery in which the deceased was injured was located on the second floor of a tower three stories high, containing all the machinery for taking coal from vessels and depositing the same in cars. On the first floor was the motive power; on the second the hoisting device and connections; on the third hoppers to receive the coal carried to that point by the contrivance described, the engineer's room, and operating levers by the manipulation of which by the hands of the engineer the machinery was controlled. The second and third floors were reached by stairways. That between the first and second floor had its

landing place near the east wall; that between the second and third floor was in the northeast corner. The deceased met his death on the second floor. It was about twenty feet square. From the middle of the east wall a steel hopper three feet wide parallel with such wall projected into the room some five feet. West of the hopper and occupying a large part of the otherwise clear space, was the machinery in which the accident occurred. The two winding drums five feet in diameter occupied the central portion of the collection of drums and gears. On the east end of each drum and of equal diameter with it there was a large gear which was turned by power being transmitted thereto by a nine-inch pinion located between them. One drum was dropped a few inches below the floor and the other was about a foot higher. From out to out of each drum it was about nine feet. The gear end of the shaft was supported by a box on a floor pier about two feet from the floor, the inside of the box being distant from the gear sufficient for a slight sleeve adjustment. As a person stood facing the outer ends of the large gears the cogs on the right-hand side of the left gear, as indicated, were only a short distance from those on the left side of the right-hand gear. The drum pinion was adjacent to the hopper. The space between the hopper and the outside of the gears was thirty-nine inches. The distance from the projecting portion of the supporting piers to the hopper was about nine inches. The passageway between the piers and the hopper for the width of the latter was as indicated. There were some other interferences so that the oiler, while doing a part of his work, was required to stand in an angle formed by the gear, drum, and supports on the west and the supporting bed for the machinery on the north with the southeast corner of the room at his back, the stairway at his left and the hopper at his right. On the flange end of the supporting bed and piers there were projecting bolt heads. There were other interferences at the floor sufficient to cause one to stumble in proceeding by or

over them unless he had in mind to avoid having his feet collide therewith. Ordinarily a proper railing was maintained on the side of the passageway towards the outer ends of the gears which, when in place, was a reasonable provision against danger of an employee from that direction getting injured by the machinery, while in performance of his duty as oiler. The railing was not in place on the day of the accident. It had been removed and placed back against the wall to permit of doing some repair work. The guard could, in a few moments, have been readily put in place. It was so designed as to permit of being easily removed and replaced as occasion required. The deceased had been in the employ of the defendant a sufficient length of time to know of the entire situation aforesaid, and did know it. It was one of his duties to assist in repairing the machinery when requested to do so. He was familiar with the performance of that part of his duties. He, as well as the engineer and foreman, was required to keep the guard aforesaid in place when repair work did not otherwise require. It was customary when making repairs to operate the machinery a short time without the guard being in place, in order to enable the head repairer to conveniently make required adjustments. Ordinarily it was the duty of the deceased, who was head oiler, to oil the machinery when it was in operation. He was in the habit of doing that with the guard rails not in place, during the adjustment period aforesaid, though it was within his competency to have the machinery stopped to allow him to safely do his work, if he desired. In the course of his duties he was required to go through the narrow passageway several times a day, but was under instructions not to do so when the machinery was in motion and the guard not in place. The accident occurred about 2 o'clock p. m. No one was present. There was no direct evidence to show how it happened. The machinery had been out of use for some two days prior to one hour before the accident to permit of repairs being done, de-

ceased helping in that regard. The machinery was being run for the purpose of making needed adjustments after the repair work, when the accident happened. There was no direct evidence of why deceased was in dangerous proximity to the machinery at the time he was injured. He went onto the second floor a few minutes before he was found there dead. The engineer being admonished by the noise of the machinery that some adjustment and oiling was needed, went from his station on the third floor to the second floor and found the deceased lying on his back, south of the narrow passageway, between the hopper and the machinery, with his head toward the south and feet toward the north. The back part of his head had been crushed off. Portions of the head lay under the north large gear, with an oil can near by. The deceased was a party to the guard rail being off prior to the time of the accident. He could have replaced it, had he seen fit, before attempting to oil the machinery, if that was what he was attempting to do when injured, or requested to have the machinery stopped.

[At the close of the evidence the trial court directed a verdict for the defendant, and from the judgment entered thereon the plaintiff appeals.]

For the appellant there were briefs by *Kaftan & Reynolds,* attorneys, and *V. I. Minahan,* of counsel, and oral argument by *Mr. R. A. Kaftan* and *Mr. Minahan.*

For the respondent there was a brief by *Wigman, Martin & Martin,* and oral argument by *J. F. Martin.*

MARSHALL, J. The judgment must be affirmed. It seems useless to discuss the evidence. The situation at the time the deceased met his death is sufficiently shown by the statement. It was dangerous to oil the machinery when in operation with the guard not in place. No one knew that better than the deceased. A sufficient guard was provided. The deceased could have had the machinery stopped while he

supplied the needed oil, or he could easily have replaced the guard before attempting to do his work. He knew it was dangerous to go through the narrow passageway while the machinery was in motion and the guard not in place. He had been prohibited from doing so. He either attempted to do that or to oil the machinery, neglecting to have the same stopped for that purpose, or to replace the guard, and so in some way met his death when it would not otherwise have occurred. So in any way the situation can reasonably be viewed his contributory negligence was the proximate cause of his death.

By the Court.—The judgment is affirmed.

LARSCHEID, Respondent, vs. KITTELL, Trustee, imp., Appellant.

February 22—March 15, 1910.

Vendor's lien on land: Equity: Waiver: Estoppel: Mortgages: Foreclosure: Allowance of attorney's fee: Evidence: Harmless error.

1. The right of the vendor of land to a lien thereon for unpaid purchase money is purely an equitable right and will not be enforced to the extent of doing inequity to others,—as where his conduct had induced others to extend credit to the grantee upon the faith of the latter's ownership of the land free from incumbrance, and the enforcement of the lien would result in loss to such creditors.
2. The services of an attorney within the presence and knowledge of the court being themselves evidence from which the court might fix their value, the allowance of a reasonable attorney's fee upon foreclosure of a mortgage without further evidence was, if error, not prejudicial. *Voechting v. Grau*, 55 Wis. 312, distinguished.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Modified and affirmed.*

Plaintiff sold to one Hashek certain lots in the town of Preble, Brown county, Wisconsin, evidently with the contemplation that some kind of a factory would be built upon them. The sale price was $1,400, but the land contract provided for the payment of $2,000, plaintiff having loaned or agreed to loan said Hashek an additional sum to the amount of $600. In December, 1907, Hashek organized the defendant corporation to take over his business, including these lots with whatever buildings and machinery had been erected thereon. Plaintiff participated in the organization of the company and agreed to take $400 of stock. Certain small amounts had been paid upon his land contract, and on January 9, 1908, the directors applied to him to make a deed, to the end that the company might borrow money upon its plant. A settlement was had, and the balance then due upon plaintiff's land contract was agreed on $1,350. He consented to make a warranty deed provided he was given a note of the company indorsed by all the directors for this $1,350, and this was done. March 12, 1908, the corporation, not having succeeded in finding a lender elsewhere, borrowed $2,500 of money of the plaintiff, for which amount it gave a mortgage upon the lots in question and buildings thereon and also a chattel mortgage upon the machinery therein.

This action was brought about March 13, 1909, first to foreclose both the real and chattel mortgage securing the $2,500 loan, and, as a second cause of action, to establish and enforce a purchase-money lien upon the equity of redemption for said $1,350. On the 7th day of April following the corporation was adjudged bankrupt, the defendant *John A. Kittell* appointed trustee and allowed to interplead as a defendant in this action. The plaintiff had at all times been a director in the corporation, which, both prior and subsequent to the making of his warranty deed, had been incurring indebtedness both for goods purchased and for money borrowed upon its general credit. It was largely insolvent at the time

of the adjudication in bankruptcy, but there is no direct proof as to insolvency at any specific earlier date. Some evidence was offered as to the understanding which plaintiff and the corporate directors had at the time of the making of the warranty deed tending to show that they contemplated that plaintiff would have a right to enforce his purchase-money note of $1,350 against the equity of redemption.

The court held that plaintiff did not intend to waive or relinquish his purchase-money lien and that the same thereafter persisted as against all except innocent purchasers, of whom there were none. Judgment was accordingly for foreclosure of the real estate and chattel mortgages and for the application of the proceeds of such foreclosure sale to the $2,500 debt thereby secured, also declaring a subsequent lien for the $1,350 note with its interest and the application of any surplus proceeds of the real-estate sale thereto, from which judgment the defendant *Kittell* appeals.

For the appellant there was a brief by *Minahan & Minahan,* and oral argument by *V. I. Minahan.*

For the respondent there was a brief by *Cady, Strehlow & Jaseph,* and oral argument by *L. D. Jaseph.*

DODGE, J. The right of a grantor of lands to have established a lien thereon for unpaid purchase money is neither a legal lien nor an interest in the real estate. It is a right merely recognized in courts of chancery in order to protect the very general equity that the purchaser shall not enjoy the property purchased with immunity from his agreement to pay therefor. 3 Pom. Eq. Jur. § 1249 *et seq.; Halvorsen v. Halvorsen,* 120 Wis. 52, 97 N. W. 494. Since it is only recognized under the broadest of equity powers and for the purpose of promoting equity in excess of legal rights, courts will not enforce it to the extent of doing inequity to others, nor in cases where the conduct of the seller has been such as to lead others to adopt a position upon the assumed absence of

any such right so that they will suffer if it is asserted and sustained. To such extreme exercises of the extraordinary function of the court of chancery is especially applicable that general rule controlling that court in all activities, that no one will be admitted as a suitor unless he comes into court with clean hands and due diligence. *Swartzer v. Gillet,* 2 Pin. 238; *Blanchard v. Doering,* 23 Wis. 200; *Raasch v. Raasch,* 100 Wis. 400, 76 N. W. 591; *Post v. Campbell,* 110 Wis. 378, 85 N. W. 1032. The exclusion of a plaintiff from the peculiar favors of courts of equity results equally where his conduct has been unconscionable by reason of a bad motive or where the result in any degree induced by his conduct will be unconscionable either in the benefit to himself or the injury to others. This rule has been applied in a multitude of cases. A few only, specially illustrative, we select from other jurisdictions: *Booker v. Smith,* 38 S. C. 228, 236, 16 S. E. 774; *Smith & Wimsatt v. Chilton,* 84 Va. 840, 6 S. E. 142; *Wilson v. Wall,* 99 Va. 353, 38 S. E. 181; *Commercial Nat. Bank v. Burch,* 141 Ill. 519, 31 N. E. 420; *Williams v. Dutton,* 184 Ill. 608, 56 N. E. 868; *Brown v. Brown,* 66 Conn. 493, 34 Atl. 490; *Stetson v. Cook,* 39 Mich. 750; *White v. Cuthbert,* 10 App. Div. 220, 41 N. Y. Supp. 818; *Lewis v. Holdrege,* 56 Neb. 379, 76 N. W. 890; *Sandeford v. Lewis,* 68 Ga. 482; *O'Neal v. Fenwick,* 23 Ky. Law Rep. 1219, 64 S. W. 952; *Haffner v. Dobrinski,* 215 U. S. 446, 30 Sup. Ct. 172.

Viewing the plaintiff's conduct in the light of this principle, we discover that a corporation of which he was a director was struggling in a business wherein day by day it was inviting credit from others in considerable amounts, both for merchandise with which to do business and for borrowed money. Amongst its ostensible assets was the land in question upon which its factory had been erected and equipped with machinery, evidently constituting a large share of its assets. In this condition of things the plaintiff issued his

warranty deed declaring to the world that the title of that corporation to the land and factory was free from all incumbrance. He took separate security for the purchase price, which, *prima facie,* was very strong evidence of an intent not to make any claim for a grantor's lien. He shortly afterwards took a mortgage securing a new loan then made, but which in the nature of things suggested to any one examining the records that he pretended no other claim against the land. Thereafter, for a year or more, he, with other directors, was active in procuring credit for the company so that all but one of the present creditors, represented as they are by the trustee in bankruptcy, have parted with their money or merchandise on the faith of the corporation's promise to repay them and implied assertion of its ability so to do. It cannot be doubted that this faith has been in large measure due to the apparent ownership of its plant free from incumbrance except the $2,500 mortgage. The conclusion is irresistible that if plaintiff meanwhile persisted in the intent to assert as against such creditors a considerable prior and secret lien, his conduct was unconscionable. If he did not so persist, then of course there was, as the only alternative, an intent to waive any such lien. Upon either ground a court of equity must decline to extend to him its extraordinary aid to protect his equity to be paid for his land to the denial of the equity of these creditors to be paid their debts incurred in reliance upon the plaintiff's own conduct. On this ground, if no other, we are convinced that the portion of the judgment establishing the lien for unpaid purchase money is erroneous.

Error is assigned upon that portion of the judgment foreclosing the mortgage for the reason that it includes an allowance of $60 expenses for attorney's fees in excess of taxable costs, in absence of any testimony as to the incurring thereof or its reasonableness. This assignment of error rests on *Voechting v. Grau,* 55 Wis. 312, 318, 13 N. W. 230. In that case it was decided that such an allowance, in absence of

some evidence other than the mere proceedings in court, was erroneous. It was not, however, held that such error necessitated reversal, since that result was predicated upon other errors also. It may be noted also as a distinction that in that case there had been no stipulation or contract in the note or mortgage as to the amount of the allowance, whereas in the present case there is a stipulation for the amount contained in the judgment. Since that case, however, this court has had occasion to re-examine generally the function of a court in passing upon the value of the professional services of an attorney at law, especially in litigation before the same court, and it has been held that such services of themselves within the presence and knowledge of the court constitute evidence from which the court itself, unaided by opinion of others as to value, or even in defiance of opinion evidence, may reach a conclusion. *Remington v. Eastern R. Co.* 109 Wis. 154, 84 N. W. 898, 85 N. W. 321; *Richardson v. Tyson,* 110 Wis. 572, 86 N. W. 250; *Ladd v. Witte,* 116 Wis. 35, 92 N. W. 365. In the light of the views so expressed we think it apparent from the record of this case that the error, if any were committed by the trial court in awarding this allowance without more evidence, was without prejudice, for the allowance was clearly reasonable for services apparent from the record.

The result of these conclusions is that the portion of the judgment establishing a vendor's or grantor's lien for $1,487.70 original purchase price and interest, and ordering payment thereof with interest out of the proceeds of foreclosure, must be stricken therefrom. Save in this respect, the judgment is correct and should be affirmed.

By the Court.—The judgment appealed from is modified by striking therefrom the paragraph establishing a vendor's lien for $1,487.70, and the portion ordering such sum with interest to be paid plaintiff out of the proceeds of any foreclosure sale thereunder, and, as so modified, the judgment is affirmed. Appellant to recover costs in this court.

LEMKE, Respondent, vs. HAGE, Appellant.

February 22—March 15, 1910.

(1) *Appeal: Review: Questions of fact.* (2–4) *Contracts: Drilling of well: Implied guaranty of success: Custom: Evidence.* (5) *New trial: Newly discovered evidence.*

1. If the evidence upon an issue is conflicting, the verdict of the jury is decisive.
2. A contract to drill a well does not imply that water shall be obtained or that the well will be a success as to either the quantity or quality of the water.
3. In order that a particular custom or usage shall be considered as part of a contract, it must be so well established, uniform, and notorious that the parties must be presumed to have known it and to have contracted with reference to it; and the proof of such custom must be positive, clear, and satisfactory.
4. A particular custom or usage to the effect that one who undertakes to drill a well is not entitled to compensation unless a reasonably sufficient supply of water is obtained, was not established by the testimony of two witnesses that they followed such practice in their own business.
5. It is not an abuse of discretion to deny a motion for new trial based on newly discovered evidence, where such evidence is merely cumulative.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This is an action to recover the sum of $580.50, alleged to be due for materials and labor furnished in digging, drilling, piping, and constructing a well. It is alleged that the agreement for the construction of the well was made in February, 1902, and that thereby the defendant was to pay $1.25 per foot for the drilling where the plaintiff furnished the piping, seventy-five cents per foot if defendant furnished it, and also $1 per foot for drilling in rock. Drilling was commenced on March 5, 1902, at a spot designated by the defendant, and was continued for three or four weeks. At a depth of 120 feet some rock was struck through which the drilling could

not be continued and the hole was abandoned. Plaintiff testified that the defendant informed him that he expected a supply of water at a depth of from seventy-five to 100 feet. A new hole was drilled and continued to the depth of 480 feet. Plaintiff claims that he was unable to drill deeper with his apparatus and that the defendant authorized him to secure a well driller who could continue the well, but that he refused to allow the work to proceed when he learned that the cost for continuing the work would be greater than the price agreed upon with the plaintiff. The amount claimed is for drilling at the agreed charge for drilling, for piping, for a steel shoe, and for pulling out the pipe from the first hole. No new agreement was made for the drilling of the second hole. Water had been obtained at various depths and when the drilling was stopped, but not in sufficient quantities to supply the needs of the defendant.

The defendant in his answer to the complaint claims that the plaintiff failed to furnish him with a reasonably sufficient supply of water, and that he is therefore not entitled to any compensation. He alleges that it is a custom in Brown county, where the well was drilled, that a well digger who undertakes to construct a well upon the terms on which the plaintiff agreed to dig his well receives no pay for his work unless a reasonably sufficient supply of water be obtained. The defendant also presents a counterclaim in the sum of $200 for board furnished the plaintiff's employees while they were working at the drilling, for feed furnished for plaintiff's horse, for fuel furnished and water hauled for plaintiff's steam engine which was used in drilling the well, and for the services of his son in assisting the plaintiff. These, except the services of his son, the defendant had agreed to furnish while the well was being dug.

The jury found that the plaintiff did not agree to furnish the defendant with a reasonably sufficient supply of water; that there was not such a supply in the well when the plaint-

iff ceased drilling; that there was a custom in Brown county, at the time of the contract, that a well digger should receive no pay for his work unless a reasonably sufficient supply of water was obtained; and that $160 was the value of the board furnished by the defendant to plaintiff, the wood for the engine, and defendant's services in furnishing water for the engine. Of the various motions made, the court granted the one to change the answer to the question whereby the jury found to the effect that there was a particular custom in Brown county not to pay a well digger for his work unless he furnished a reasonably sufficient supply of water. This action of the court was based on the ground that the evidence introduced by the defendant to establish such a custom tended only to establish particular instances and wholly failed to show such a custom. Judgment was ordered in plaintiff's favor.

Upon defendant's motion for a new trial, several affidavits were presented to the court upon the question of the particular custom regarding paying for well diggers' work in the event that a reasonably sufficient supply of water was not obtained, but the court denied the motion, holding that the affidavits did not establish a good ground for granting a new trial on such alleged newly discovered evidence. This is an appeal from the judgment in favor of the plaintiff.

For the appellant there was a brief by *Wigman, Martin & Martin,* and oral argument by *Joseph Martin.*

For the respondent there was a brief by *Calkins & McGruer,* and oral argument by *L. A. Calkins.*

SIEBECKER, J. The issues litigated between the parties turn largely on the question of whether or not plaintiff contracted to construct a well on defendant's premises at the stipulated price, with a guaranty that such well would furnish a good and sufficient supply of water for defendant's farming and domestic purposes. Upon the evidence adduced the jury found that the plaintiff did not expressly agree to

construct such a well. Since the evidence was in conflict on this issue, the verdict is decisive thereof.

Defendant claims that a contract to dig a well is an agreement to furnish such a supply of water. In *Butler v. Davis,* 119 Wis. 166, 96 N. W. 561, it was declared that a contract to drill a well did not imply that water should be obtained or that it would be a success as to quantity or quality. The defendant contends that if the contract to dig the well embodied no such implication, then, under an alleged well-established custom in the well-digging business to the effect that a party who undertook the digging of a well was not entitled to compensation unless a reasonably sufficient supply of water was obtained, plaintiff was required to furnish such a well as part of the agreement. The court received evidence concerning the existence in Brown county of this alleged custom and submitted an inquiry in the special verdict upon this question. The jury answered it by a finding that such a particular custom existed in the county. After verdict the court held that the evidence did not sustain this finding of the jury and changed the answer to this question, thus negativing the existence of this custom. The defendant insists that the evidence was ample to sustain the finding of the jury and contends that the changing of the answer by the court was error. Proof of a particular custom or usage must be positive, clear, and satisfactory. In speaking on this subject, this court, in an early case (*Power v. Kane,* 5 Wis. 265), declared:

"It is not readily adopted by courts, and the proof of such usage must be clear and explicit, and the usage so well established, uniform, and so notorious that the parties must be presumed to know it, and to have contracted in reference to it." See, also, *Hinton v. Coleman,* 45 Wis. 169.

An examination of the evidence of the two witnesses testifying on this subject discloses that their information respecting the alleged custom was very indefinite and unsatisfactory, and failed to show that such a custom was "so well established, uniform, and so notorious" that persons of this com-

munity would be presumed to know it and to contract with reference to it. In effect the evidence shows that the witnesses testifying followed such a practice in their own businesses, but it falls far short of showing that persons generally knew of it and contracted with reference to it. We are of the opinion that the court properly held that the jury's finding that such a particular custom or usage existed was not supported by the evidence.

It is contended that the court erred in awarding judgment to the plaintiff on the verdict as amended by the court, for the reason that it fails to determine whether or not plaintiff was justified in abandoning the contract. The plaintiff testified that he proceeded with the construction of the well to the depth of the capacity of his machinery and appliances and so informed the defendant; that defendant assented to his proposal to engage another well digger to proceed with the construction; that he engaged another well digger, but that the defendant refused to permit such digger to proceed with the work at the cost demanded; and that he therefore ceased further efforts to complete the well. The defendant's denial of the plaintiff's testimony raised an issue of fact. Since the jury were not requested by their verdict to make a finding on this issue, it must be held to have been determined by the court in accordance with the judgment awarded, under sec. 2858*m*, Stats. (Laws of 1907, ch. 346). In the light of the conflict of evidence on the question, plaintiff's testimony is sufficient to support the court's finding.

It is averred that the court erred in denying the motion for a new trial based on newly discovered evidence. The alleged newly discovered evidence bears on the questions litigated and is additional to the evidence produced on the trial. The court's conclusion that the facts presented were not sufficient to present a good ground for a new trial is well supported. It did not abuse its discretion in refusing a new trial.

By the Court.—Judgment affirmed.

COFFEEN, Appellant, vs. TOWN OF PREBLE, Respondent.

February 22—March 15, 1910.

Poor-laws: Relief in emergencies: Questions for jury.

1. Under sec. 1499, Stats. (1898), a distinction exists between that degree of poverty and indigence which will entitle one to support from the town and that which will entitle him to temporary relief in emergency.
2. Where the necessity for aid is urgent and the afflicted person poor, indigent, and helpless to such a degree that obtaining relief without town aid in time to save life or health may be impossible, it cannot be said as matter of law that he is not entitled to relief from the town merely because he possesses some meager property not immediately available for conversion into cash or as a basis of credit.
3. It was a question for the jury in this case whether a family consisting of father, mother, and minor son, all of whom were ill with typhoid fever and bedridden, were entitled to relief from the town, although they owned a homestead worth $725, subject to a mortgage not exceeding $450, and had about $7 in money and some credit at a grocery.

MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

This action was brought to recover for medical services rendered for the Doyle family, alleged poor persons, which services are alleged to have been performed at the special instance and request of the defendant town. The defendant, after certain admissions, denied that said Doyles were paupers and also that the town had ever engaged the plaintiff to attend them. The jury returned the following verdict:

"(1) What was the value of Michael Doyle's property in March, 1907? *A.* $725.

"(2) Did the chairman of the defendant town, with the knowledge and consent of another supervisor of said town, employ the plaintiff, *W. B. Coffeen,* as a physician to attend and take care of Michael Doyle, his wife and son? *A.* Yes."

It appeared without dispute that there was a mortgage of $400 upon the property and some interest not exceeding $50, leaving the equity of redemption worth between $275 and $300. Both parties moved for judgment on the verdict. Thereafter the court made and filed its decision, which appears in the record, and ordered judgment for defendant dismissing the plaintiff's complaint. Judgment was rendered accordingly in favor of the defendant, from which this appeal was taken.

For the appellant there was a brief by *Calkins & McGruer*, and oral argument by *L. A. Calkins*.

For the respondent there was a brief by *Kaftan & Reynolds*, and oral argument by *R. A. Kaftan*.

The following opinion was filed March 15, 1910:

KERWIN, J. Sec. 1499, Stats. (1898), provides:

"Every town shall relieve and support all poor and indigent persons . . . whenever they shall stand in need thereof. . . ."

It will be seen that this statute provides for "relief" as well as "support" in case of need; and the question arises whether the Doyles were poor and indigent persons in need of relief or support. If so, the supervisors had authority under the statute to bind the town for such relief. The jury found that defendant employed the plaintiff as physician to perform professional services in taking care of the Doyle family, and also found the value of Doyle's property to be $725. The findings are supported by the evidence. The foregoing were the only questions submitted to the jury. It further appears without substantial dispute that the head of the Doyle family, consisting of father, mother, and minor son, owned a house and one acre of land in the country constituting a rural homestead, which was subject to a mortgage of $400 and some accrued interest not exceeding $50; that the mother had $7 in money and the father some credit

at the grocery; that at the time of the employment of plaintiff the whole family were ill with typhoid fever, and were then residents of the defendant town. About a month after the contract with plaintiff was made the Doyles succeeded in getting $100 on a second mortgage on the homestead.

It will be observed that this is not a proceeding to compel the town to support the Doyles or a suit to hold the town liable for their support, but an action by the physician to recover on a contract of employment in a case where the poor and indigent persons were in need of relief because of their helpless condition occasioned by the sickness of all members of the family. All occupants of the house were down sick and bedridden. They were unable to procure a nurse, and the plaintiff notified the town officers, who furnished and paid for a nurse. The $7 which Mrs. Doyle had was needed for the purchase of milk for the three sick persons. Now it is plain, we think, under the statute that the town is bound to furnish to poor, indigent persons relief as well as support. "Relief" is a relative term, and covers such an emergency as is claimed here by the plaintiff, and the question whether the afflicted person was so poor and indigent as to entitle him to relief from the town notwithstanding he had some little property not edible or easily convertible was a jury question. *Poplin v. Hawke,* 8 N. H. 305; *Sturbridge v. Holland,* 11 Pick. 459. It is easy to see that a distinction exists between that degree of poverty and indigence which will entitle one to support from the town and that which will entitle him to temporary relief in an emergency. The distinction is recognized in *Rhine v. Sheboygan,* 82 Wis. 352, 52 N. W. 444. It is doubtless true that if the whole family had not been bedridden, but one had remained who could have gone out and made an effort to negotiate a loan upon the small equity in the property or procure a nurse, some effort should have been made in that direction before applying to the town for relief. But where, as in the case before us, the necessity for aid is

urgent, and the afflicted person poor and indigent to such a degree that obtaining relief without town aid in time to save life or health may be impossible, it cannot be said as matter of law that the person possessed of the meager property shown in this case is not entitled to such relief. Whether the person is entitled to relief must depend upon the particular facts of the case. The comparative lack of property, the severity of the affliction, the helplessness of the person applying for relief, the necessity for immediate action, and the availability of his property for conversion into cash or as a basis for credit, as well as the situation of the afflicted with respect to prosperous and willing friends and relatives, are all to be considered. It is obvious from the opinion of the learned trial judge in the record, in connection with the special verdict submitted, that he did not consider the question as to whether the Doyles were entitled to relief under the evidence a jury question, but held as matter of law, upon the verdict and undisputed facts, that they were not entitled to relief. In this we think the court was in error. There was a jury question as to whether the afflicted person was so poor and indigent as to entitle him to relief from the town. If we consider that the court found this question in favor of the town under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), then he found incorrectly, because it is apparent from his written opinion that he considered the subject too narrowly. It follows that the judgment must be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

The following opinion was filed April 8, 1910:

MARSHALL, J. (*dissenting*). The case turns on the meaning of this language in sec. 1499, Stats. (1898):

"Every town shall relieve and support all poor and indigent persons . . . whenever they shall stand in need thereof. . . ."

The court has nothing to do with making the policy of the statute. It may be that it would be a very humane policy to relieve persons at public expense who are poor in the general sense, when so situated as not to, presently, have the means of coping with misfortune, though having property or credit so that they are not under such complete disability but that by use of their personal credit, or that and some property, though not having money presently available, they can care for themselves, but does the statute contemplate such relief? That is the question. If it does not, it is not within the competency of the court to extend the purpose of the written law by a species of judicial charity. If it were otherwise, the situation in this case, like many others met with, from time to time, would efficiently call upon human sympathy. It is only given to us to discover the legislative idea incorporated into the written law. If it goes further than would seem to us to be wise public policy, we cannot restrict it. If it does not go so far as such policy would seem to demand, we cannot extend it in general, or to fit the exigencies of particular cases.

The court gives much signification to the use of the term "relief" as well as "support" in the statute as if the legislative idea was to provide for "relief" in cases where there is a degree of poverty not requiring more than temporary help, and "support" where there is actual pauperism, but to my mind no such idea was in legislative contemplation. No such thought has heretofore found a place in any adjudication of this court. It will be noted that there is but one class of persons made by the statute competent to receive public aid, viz., poor and indigent persons. Such and only such are entitled to either relief or support. Poverty and indigence is the sole test of whether an applicant for public aid is entitled thereto, to any extent. Therefore, the basic question in this case, is, What does the statute mean by "poor and indigent?" If the court has spoken plainly and decisively on that question, the doctrine of *stare decisis* should apply, un-

less the court is prepared to overrule previous adjudications, which I do not understand to be the case.

It is suggested that in *Rhine v. Sheboygan,* 82 Wis. 352, 52 N. W. 444, the court recognized the existence of a degree of poverty, not extreme, which will entitle a person to temporary relief, but not temporary support. True, *arguendo,* and wholly *obiter,* something was said about urgency of condition and authority within the spirit of the law to afford some degree of relief, and not support. Even that referred to conditions of urgency, not to any power to add by public contribution to the ability of a person, partially short on means, to enable him to provide for his needs without entirely using up what means and credit he has, and without any suggestion that it was within the letter of the statute. Coming to the words of decision, it was said:

"It is not the poor man, as contradistinguished from the man of ample means or the rich, that is an object of charity; it is the *pauper,* and not the poor man in the ordinary sense of the term, the man not only in want, but who has no means or resources for relieving it, who is entitled to the statutory aid provided in obedience to the dictates of the humane policy of the statute relating to the poor."

Mark the language, "no means or resources for relieving it, who is entitled to the statutory aid provided in obedience to the dictates of the humane policy relating to the poor." "The word 'poor' in the statute has a restricted and technical meaning, and it is practically synonymous with 'destitute,' denoting extreme want and helplessness." In harmony with that construction the court held that public aid was not permissible in the particular case which had substantially the characteristics of this case.

Thus it will be seen that this court has held that public aid, either in the form of relief or support, cannot properly be extended to a person unless he is of the class denominated "poor and indigent," and that "poor and indigent" is a synonym for "pauper," and that pauper means a person who is

utterly destitute, and that such restricted meaning cannot be extended by charitable considerations to meet particular situations.

In *Wis. K. I. Co. v. Milwaukee Co.* 95 Wis. 153, 70 N. W. 68, the construction of the statute above indicated was affirmed, and it was held that a law to extend aid to a person by way of treating him for an infirmity merely because he has not the means, presently, to pay therefor himself, not only, is not within the statute under consideration, but that a legislative act to accord such aid would be unconstitutional; that to come within the statute or within the competency of the legislature to provide by written law, the person must be a pauper; a person in "extreme want and helplessness." That was referred to approvingly in *Wis. Ind. School v. Clark Co.* 103 Wis. 651, 666, 79 N. W. 422, and again in *State ex rel. Garrett v. Froehlich,* 118 Wis. 129, 94 N. W. 50, as holding that mere destitution respecting present means does not fall within the statute or the constitutional right to relieve poor persons; that destitution in the extreme sense, is required.

This court having thus by a long line of decisions construed our statute, no good reason seems to exist for seeking for light in foreign jurisdictions. Excursions of that kind and drafts from judicial observations without attempting to overrule the previous declarations here, tend to confuse.

As I understand it, there is no claim that the circumstances of this case satisfy the calls of our statute when construed as aforesaid. The evidence is undisputed that the subjects of public charity involved were not paupers. The head of the house was very far from utter financial helplessness. He had both property and credit sufficient to enable him to employ a physician. He had not experienced any failure to obtain medical assistance. It is quite clear that he could readily have obtained all such needed help though, perhaps, not presently able to pay therefor. The supposed poor per-

sons did not make any application to the town officers to employ a physician for them. They had the appellant and were satisfied with him. It was the appellant, seemingly, by consent of the husband and wife, who notified the town that a nurse was needed as the family were all sick and could not attend to hiring one themselves, and had no means, presently, to pay one with. He had been treating the family, taking his chances on their getting well and being able to pay him, or to pay him in due time, as is often the case with people of moderate means. He, at no time, on account of poverty of the family, declined to administer to them. He did not inquire into their circumstances only so far as to satisfy himself that they had no money presently with which to hire a nurse and thereupon, by consent as aforesaid, he asked the town officers, or some of them, to provide one, and was asked to hire a nurse and look after the town interest in the matter. No party to the transaction regarded them as paupers.

In view of the foregoing, I cannot come to the conclusion that the learned trial court was clearly wrong in deciding that the alleged poor persons were not proper subjects, within the meaning of the statute, for public aid.

LATTON, Respondent, vs. MCCARTY and others, Appellants.

February 23—March 15, 1910.

Mortgages: Satisfaction by deed: Payment: Vendor's lien: Enforcement in action to foreclose mortgage: Judgment.

1. A deed by which a mortgagee conveys to the mortgagor or owner of the equity of redemption all the estate, right, title, interest, claim, or demand in law or in equity of the mortgagee in and to the mortgaged land, operates to satisfy and discharge the mortgage and cannot be contradicted by evidence of a contemporaneous parol agreement that the mortgage shall not be affected thereby.

2. Discharge of a mortgage securing an unpaid balance of purchase money of the land does not *per se* establish payment of such balance, and it may be shown that it was not paid.
3. In an action to foreclose a mortgage securing purchase money, if it appears that the mortgage has been discharged but that the purchase money has not been paid, the court may enforce plaintiff's right to a vendor's lien, treating the complaint as amended to conform to the facts proved.
4. A judgment in such case decreeing foreclosure of the mortgage and sale of the land is permitted to stand after striking therefrom the award of attorney's fees and the direction for a deficiency judgment, since as thus modified it accomplishes the same result as a judgment enforcing the vendor's lien, on terms more favorable to the defendant than are usually imposed.

APPEAL from a judgment of the circuit court for Taylor county: JOHN K. PARISH, Circuit Judge. *Modified and affirmed.*

On October 10, 1898, Mike Wagoner and his wife executed a mortgage upon a certain parcel of real estate owned by him in the city of Medford, to secure a note for $250 signed by them in favor of *Arthur J. Latton.* On October 24, 1898, Mike Wagoner entered into a land contract with *John McCarty,* whereby, in consideration of $600, Wagoner agreed to give a warranty deed of these premises to *McCarty* when the purchase price was fully paid. *McCarty* paid $100 at the time of the execution of the contract and agreed to assume payment of the $250 mortgage from Wagoner and his wife in favor of *Latton.* The balance of the purchase price, amounting to the sum of $250, was to be paid in quarter-yearly instalments of $30 each. On June 13, 1899, in consideration of $185, the sum still to be paid on the land contract exclusive of the mortgage, Wagoner assigned his interest in the land contract to *Latton,* and Wagoner and his wife executed a quitclaim deed of the premises in favor of *Latton.* By mutual agreement of *Latton,* Wagoner, and *McCarty,* Wagoner was released from liability on the note and mortgage and *McCarty* assumed it. It was under the conditions

of the deed from Wagoner and his wife to *Latton* that Wagoner was to be released from liability on the mortgage debt and that *Latton* agreed to deliver a good deed to *McCarty* upon fulfilment of the conditions of the land contract. On March 19, 1902, upon payment by *McCarty* to *Latton* of a certain amount upon the land contract, *Latton* executed a warranty deed in favor of *McCarty*. *Latton* alleges in the complaint in this action that at the time he gave *McCarty* this warranty deed *McCarty* paid him $98.88 on the note and mortgage which he held against the premises; that it was agreed and understood that there was an unpaid balance on the note and mortgage amounting to $200; that the mortgage was not satisfied or discharged; that it was understood that it was unnecessary to make a new mortgage to secure this amount and that the old mortgage could be continued under the parol agreement; and that *McCarty* agreed and promised to pay the balance it secured. The plaintiff brings this action to foreclose this mortgage. The defendant *Catherine McCarty* is the wife of *John McCarty, Maggie Perry* is a daughter and a purchaser of part of these premises, and *Sherman Perry* is *Maggie Perry's* husband. The defendant alleges full payment of the purchase money and that the mortgage debt is fully paid and the mortgage discharged.

The court found that all the allegations of the complaint were true and that *Maggie Perry* had notice of the mortgage lien when she purchased from *McCarty*. The facts found are that Wagoner and his wife made and executed and delivered the mortgage to the plaintiff to secure the note for $250; that Wagoner thereafter executed to *John McCarty* a land contract covering these premises, in consideration of $600 to be paid by *McCarty;* that *McCarty* agreed to pay, as part of the purchase money, the $250 note, which was secured by the mortgage and specified in the land contract; that Wagoner thereafter assigned his rights under the land contract to the plaintiff, *Latton,* and that Wagoner and his wife

conveyed the premises to him by quitclaim deed under an agreement of the parties and *John McCarty* that *McCarty* would pay the balance due on the contract and the $250 note to *Latton;* that thereafter, on March 19, 1902, *Latton* made, executed, and delivered to *John McCarty* a warranty deed of the premises, granting all his "estate, right, title, interest, claim or demand whatsoever," either in law or equity, and covenanting that the same were clear and free from all incumbrances; and that it was verbally agreed that there was still due on the mortgage and note of $250 the sum of $200, and that the mortgage securing it should be deemed to continue and remain in force to secure the payment of such $200 and interest.

The court awarded judgment declaring that the mortgage was a subsisting one, and was in force as security for the payment of the $200; decreed foreclosure thereof and a sale of the premises upon the usual conditions; awarded a recovery of $25 as solicitor's fees; and ordered a judgment for a deficiency in case the proceeds on sale were not sufficient to defray the expense of sale and the amount due on the judgment. This is an appeal from the judgment.

For the appellants there was a brief by *Schweppe & Urquhart,* and oral argument by *E. H. Schweppe.*

M. A. Buckley, for the respondent.

SIEBECKER, J. The evidence as to many of the facts stated above is undisputed. The findings of the court do not cover many of these undisputed facts. The main controverted and material issues of fact were whether or not the mortgage on the premises, securing payment of the $250 note, was discharged; whether or not a portion of the purchase money remained unpaid; and whether or not the defendant *Maggie Perry* had notice that a part of the purchase money which was due from *McCarty* remained unpaid at the time she purchased a part of the premises. These issues were

embraced in the court's findings. It found that $200 of the purchase money remained unpaid at the time the plaintiff made, executed, and delivered a deed of the premises to the defendant *John McCarty*, that *Maggie Perry* had notice thereof before the conveyance of a part of the property to her on June 18, 1903, and that by parol agreement of plaintiff and *McCarty* the mortgage was to be continued as a security for the payment of this balance of the purchase money. Though the finding states this amount to be due upon the note and mortgage which were given by Wagoner and his wife before plaintiff became the owner of the premises, it also appears that the defendant *John McCarty* had purchased the premises under a land contract, and agreed at the time of the conveyance to him to pay, as part of the consideration for the purchase of the premises, the amount due on the note and mortgage. The court found that at the time plaintiff by warranty deed conveyed title to the premises to *McCarty* (March 19, 1902), it was orally agreed that the mortgage should remain in force and unsatisfied. The court held that such an agreement was effectual to continue this mortgage as a subsisting obligation and awarded judgment of foreclosure and for a sale of the premises. The appellant assails this judgment upon the ground that this parol agreement of the parties to continue the mortgage given plaintiff prior to the delivery of his warranty deed of the premises to *McCarty* on March 19, 1902, is wholly void and ineffectual. The contention is that the warranty deed from plaintiff to *McCarty* operated as a satisfaction and discharge of the mortgage, and that the oral agreement to keep the mortgage alive contradicts the effective parts of the deed, whereby plaintiff conveyed all his right, title, and interest in the premises and warranted that they were free and clear from all incumbrances whatsoever. The deed contains nothing excepting this mortgage from its terms. The court finds, and the evidence supports the conclusion, that the parties attempted to except the mort-

gage from the operation of the deed by the parol agreement. This shows that the parties assumed that the mortgage was not excepted by the terms of the deed. The deed grants, sells, remises, releases, and conveys the premises, together with the hereditaments and appurtenances thereunto belonging, and "all the estate, right, title, interest, claim, or demand whatsoever" of the plaintiff, either in law or equity, in possession or expectancy. Surely these words in their natural import and meaning embrace plaintiff's rights under the mortgage, and hence those rights were thereby conveyed to the grantee, *McCarty*. It is a general rule that such a conveyance by a mortgagee to a mortgagor or the owner of the equity of redemption operates to satisfy and discharge the mortgage. *Mason v. Beach*, 55 Wis. 607, 13 N. W. 884; *Waters v. Waters*, 20 Iowa, 363; *Woodbury v. Aikin*, 13 Ill. 639; *Barr v. Foster*, 25 Colo. 28, 52 Pac. 1101; *Mutual B. & L. Asso. v. Wyeth*, 105 Ala. 639, 17 South. 45.

In *Mason v. Beach, supra*, this court, after discussing the nature of a mortgage claim or interest in the premises mortgaged, declares:

"Whatever interest in the land the mortgagee obtains, less than the fee, under these decisions, and whatever it may properly be denominated, it is certainly an *interest*, and a substantial interest, which may pass by a conveyance. By our statute (sec. 2203, R. S.) 'conveyances of land, *and of any estate or interest* therein, may be made by deed,' etc. It follows, therefore, that, according to the old or the modern theory of mortgages, a quitclaim deed by the mortgagee will operate as a discharge of the mortgage."

We thus have a situation wherein plaintiff's conveyance of the premises by warranty deed operated to satisfy and discharge the mortgage theretofore given him thereon, but which the court, in effect, held was excepted from the deed by the parol agreement of the parties. This was, in effect, a holding that the parties could by parol evidence contradict their written agreements embraced in the deed, whereby the plaint-

iff conveyed all his estate, right, title, interest, claim, or demand, in law or in equity, in these premises to *McCarty*. It is well established that in the absence of fraud or mistake the written agreements of parties cannot be so contradicted or modified by parol. Upon this consideration it must be held that the court erred in ruling that this mortgage was a subsisting valid conveyance and in awarding judgment for its foreclosure and a sale of the premises.

The discharge of this mortgage, securing payment of an unpaid balance of the purchase money, does not *per se* establish payment thereof, and it was competent to show that it remained unpaid. We consider the evidence on this subject as ample to sustain the finding that $200 of the purchase money remained unpaid at the time plaintiff conveyed the premises by warranty deed to *McCarty* and when the action went to judgment. Under these facts plaintiff clearly had a right to a vendor's lien on the premises for this balance, with interest thereon. While the complaint, in form, is one for foreclosure of the mortgage and a sale of the premises, and was no doubt intended to embrace no other cause of action, nevertheless it alleges all the facts necessary to the right to a vendor's lien and a foreclosure thereof. It is manifest that the question of whether or not a part of the purchase money was still due plaintiff from the vendee, *McCarty*, was as fully litigated by the parties by the issues tried as it could have been in an action to enforce a right to a vendor's lien. All the other facts pertinent to the right to such a lien by the plaintiff are well-nigh undisputed and hence the record is complete for enforcing plaintiff's right to such a lien. "Relief by way of declaring and enforcing a vendor's lien is of the same general character as relief upon a bill to foreclose a mortgage to secure purchase money" (*Mutual B. & L. Asso. v. Wyeth, supra*), and should therefore be awarded, under the facts shown, if the complaint and the relief demanded will permit it. As indicated, the facts alleged sustain this

right, and the demand for general relief, in addition to the specific relief for a foreclosure and sale, are sufficient in equity to embrace the right to relief by an enforcement of the purchase-money lien.

But plaintiff is not confined to the general equitable jurisdiction for authority to obtain such relief. Sec. 2886, Stats. (1898), contemplates that, where issue has been joined and the action tried, "the court may grant . . . any relief consistent with the case made by the complaint and embraced within the issue." This statute has been applied, after issue joined, in many cases in this court, and under a liberal construction judgment has been rendered on the merits, in the furtherance of justice. Under such circumstances the court has deemed the pleading amended so as to conform to the facts proven, and has granted relief thereon, if consistent with the case made by the complaint and embraced in the issues. This accords with other Code provisions prescribing that the court shall at every stage of the action disregard any error or defect in the pleading or proceeding which does not affect an adverse party's substantial rights, and that this court shall not reverse a judgment for such errors. We cite the following cases as analogous to the instant case, wherein this policy of the statutes has been liberally applied and fully vindicated: *Leonard v. Rogan,* 20 Wis. 540; *Hopkins v. Gilman,* 22 Wis. 476; *Strœbe v. Fehl,* 22 Wis. 337; *Kimball v. Darling,* 32 Wis. 675; *Brook v. Chappell,* 34 Wis. 405; *Sage v. McLaughlin,* 34 Wis. 550; *Lemke v. Daegling,* 52 Wis. 498, 9 N. W. 399.

We are of opinion that the court should have awarded judgment declaring $200 of unpaid purchase money, with interest thereon, was owing by the defendant *McCarty* to the plaintiff; that plaintiff had a right to a vendor's lien on the premises for the amount due, with costs of the action; and also should have ordered a sale of the premises upon terms and conditions conformable to equity, if *McCarty* should fail

to pay the judgment as required. The judgment entered accomplished this result on terms more favorable to *McCarty* than a court of equity usually imposes under the circumstances shown. In the light of this state of the case, we hold that the complaint must be considered amended to conform to the proof; that the judgment should be modified by striking therefrom the parts awarding plaintiff recovery of $25 as solicitor's fees and ordering that a judgment for a deficiency after sale may be rendered against *John McCarty;* and that the judgment should be, and it hereby is, affirmed in all other respects.

By the Court.—The judgment is ordered modified by striking therefrom the parts specified in the opinion. As so modified it stands affirmed; appellant to recover costs on this appeal.

DARLINGTON and another, Respondents, vs. J. L. GATES LAND COMPANY, Appellant.

February 23—March 15, 1910.

Deeds: Covenants as to title: Duty of grantee to record: Presumption as to recording: Pleading: Demurrer: Fraudulent representations not merged in covenants: Action, tort or contract?

1. As against the grantor, the grantee in a warranty deed has a right to rely upon the covenants therein and is not charged with any duty to record the deed for the purpose of cutting off the title of prior grantees who are not in possession and whose deeds have not been recorded.
2. In an action by the grantee in a warranty deed against the grantor for breach of covenants by reason of prior conveyances, the court will not presume, in support of a demurrer to the complaint, that the deed to plaintiff, or a land contract pursuant to which it was given, was recorded at any particular time or that the prior grantees did not take possession or record their conveyances until after plaintiff had or might have recorded his

contract or deed. If plaintiff's deed was in fact first recorded and the rights of the prior grantees were thereby cut off, that is defensive matter.

3. If, by a liberal interpretation of the averments of a complaint, a good cause of action can be gleaned therefrom, a general demurrer should be overruled.

4. An averment in a complaint that timber was cut and removed during a certain month but not prior to the 15th may, by a liberal interpretation and as against a demurrer, be deemed to allege, though in a vague and indefinite manner, that the timber was being cut and removed at the time a deed was delivered to plaintiffs on the 25th of that month.

5. Fraudulent representations as to title, knowingly made by the vendor and relied upon by the vendee to his damage, do not become merged in the covenants of a warranty deed subsequently given; and a tort action for the deceit may be maintained.

[6. How or to what extent the right of the grantee in a warranty deed to recover for fraudulent representations of the grantor that he owned the land and the timber thereon would be affected by the fact that such grantee recorded his deed before prior grantees of the timber recorded theirs or went into possession, where such grantees of the timber afterwards cut and removed the same, is not determined.]

APPEAL from an order of the circuit court for Rock county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a general demurrer to the complaint.

The complaint in substance sets forth that on January 15, 1905, a written contract was made between the plaintiffs and the defendant, by the terms of which the defendant promised to convey to the plaintiffs 4,894.51 acres of land by deed of warranty, free and clear of incumbrances, for $25,737.81; that pursuant to this contract a warranty deed in due form was made, executed, and delivered by the defendant to the plaintiffs on January 25, 1905, and that the plaintiffs paid therefor the consideration mentioned in said land contract; that the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section 24, township 33 N., of range 7, were included in said contract and

conveyed to said plaintiffs by said deed; that said defendant on or about October 17, 1904, sold and conveyed by an instrument in writing to one William Diamond the timber on said descriptions; that the south half of the northeast quarter of section 26, in the township and range aforesaid, was likewise included in said land contract and conveyed to plaintiffs by said deed, and that by an instrument in writing bearing date November 28, 1904, said defendant sold the timber on said tract of land to one Charles Wood, and conveyed to said Charles Wood the right to enter upon said parcel of land and to cut and remove said timber; that the conveyances to Diamond and Wood were not a matter of record on January 15, 1905, when the land contract with the plaintiffs was executed; that prior to the execution of said land contract the plaintiffs entered on the lands described therein and made an examination thereof, which said examination was completed during the month of December, 1904; that at the time such examination was made no person was in the occupancy or possession of the parcels of land described in the conveyances made to Diamond and Wood. On information and belief the plaintiffs allege that said lands were unoccupied on January 15, 1905; that there was a large amount of valuable timber on the lands described in the conveyances to Diamond and Wood; that before making said land contract the plaintiffs represented to defendant that they desired to purchase the tract of land in question for a sheep ranch; that it was absolutely essential that they should have the timber on the aforesaid parcels of land situated in sections 24 and 26 in order to erect the necessary buildings for their sheep ranch; that the president of the defendant company falsely and fraudulently represented that defendant owned said timber and that the same was part of the property which defendant proposed to sell, and that if the lands in question were purchased by the plaintiffs the timber thereon would be purchased and conveyed with them; that, relying on such representations and believing them to be true, plaintiffs entered

into the contract of January 15, 1905, and subsequently accepted the deed of said lands and paid the consideration therefor; that said Diamond and Wood, without the knowledge or consent of the plaintiffs, during the months of January, February, and March, 1905, cut and removed the timber purchased by them; that by reason of the false representations made by the agent of the defendant to the plaintiffs, and by reason of the fraud and deceit practiced upon said plaintiffs, and by reason of their reliance on such representations, plaintiffs suffered damages in a large sum, for which judgment is demanded. In addition to the market value of the timber cut and removed, plaintiffs allege certain facts tending to show special damage by reason of the removal of the timber, for which judgment is also demanded.

For the appellant the cause was submitted on the brief of *L. M. Sturdevant.*

W. H. Stafford, for the respondents.

BARNES, J. The appellant contends that the complaint fails to state a cause of action for damages for deceit based on the fraudulent oral representations alleged. It further contends that no cause of action is stated for damages for breach of the covenant of warranty contained in the deed. In support of the position taken, it is argued that the complaint shows that the timber deeds were not recorded; that the vendees in such deeds were not in possession of the lands when the defendant's deed to plaintiffs was delivered; that the timber had not been cut and removed from the lands on such date; that it should be presumed that plaintiffs pursued the usual and customary business methods and promptly recorded their deed; and that by virtue of the recording act (sec. 2241, Stats. 1898) the timber deeds became and were wholly void as to the plaintiffs, and they received by their conveyance everything that the defendant agreed to sell and in fact did sell to them.

The complaint alleges positively that the vendees in the

timber deeds were not in possession of the lands in December, 1904, when the plaintiffs examined them, and states on information and belief that they were not in possession on January 15, 1905, when the land contract was in fact executed. It is silent as to whether they went into possession or cut any timber between January 15th and the date when the warranty deed was delivered, being the 25th of the same month, except as it alleges that during the months of January, February, and March, 1905, such vendees entered into possession of the lands and cut and removed the timber. The complaint also avers that the timber deeds were not recorded on January 15, 1905, but is silent as to whether or not such deeds were recorded at any time thereafter. It contains no averment that either the deed or the land contract was ever recorded.

It is obvious that there was a breach of the covenant of warranty when the deed was delivered. By that covenant the defendant represented that it had good title to timber which it did not own. Its warranty was not that the plaintiffs would get good title if they promptly recorded their deed, or if they had recorded their land contract, so as to cut off prior outstanding equities in favor of third parties who had purchased a part of the property but had failed to either go into possession or record their conveyances.

If the grantees in the timber deeds either entered into possession of the lands or recorded their conveyances (assuming that they were entitled to record) prior to the time the deed or land contract to plaintiffs was recorded, such grantees got good title, as against the plaintiffs, to the timber which they purchased. In order to hold that no cause of action exists in favor of the plaintiffs, we must assume either (1) that the land contract was recorded on January 15th; or (2) that the grantees in the timber deeds did not go into possession of the lands or record their deeds prior to the date on which the deed or land contract to plaintiffs was recorded; or (3) that

such grantees did not take possession of the lands or record their conveyances until the plaintiffs might have recorded their deed, and that they cannot recover if they lost any rights by failing to record their conveyances promptly. As to the defendant, the plaintiffs were not obliged to record their deed or land contract at all. They had a perfect right to rely on the covenants of warranty contained in their deed, and were not charged with the duty of assuming that such covenants were untrue in fact. What was said by the Connecticut court in reference to a claim that an action for deceit would not lie for a fraudulent representation as to title because the vendee might have protected himself by examining the registry records is equally applicable to the situation presented in this case. The court used this language:

"It is an extraordinary defense for a man, when sued for making a false and fraudulent representation, respecting the title of another, by which the purchaser became deceived and defrauded, to say to him you cannot recover because by searching the records you might have discovered the falsity of my representations; in other words, because you believed what I stated to be true, and acted accordingly without further evidence." *Watson v. Atwood*, 25 Conn. 313, 320.

In order to hold the complaint bad, this court cannot indulge in the presumption that plaintiffs recorded their deed or land contract at any particular time. If these instruments were recorded in time to render the timber deeds void, such fact is defensive matter. Unless we indulge in the presumption that such documents were recorded at some particular time, manifestly the complaint states facts sufficient to constitute a cause of action.

The complaint should also be sustained on another ground. If, by a liberal interpretation of its averments, a good cause of action can be gleaned therefrom, the demurrer should be overruled. *Roe v. Lincoln Co.* 56 Wis. 66, 70, 13 N. W. 887. Reading the complaint in the light of this rule, it can reasonably be construed as alleging, in a vague and indefinite man-

ner, that the timber on the lands in dispute was being cut and removed at the time the deed was delivered to the plaintiffs. The statement is in effect that the timber was cut and removed during that month, but not prior to the 15th. It is true the entry might not have been made until after the 25th, but this uncertainty of averment should be remedied by a motion to make the complaint more definite and certain, and does not render the complaint demurrable. *Roe v. Lincoln Co., supra.*

It is evident from a reading of the complaint that the pleader attempted to state a cause of action for damages for deceit arising out of fraudulent representations as to title, knowingly made, and which induced the plaintiffs to purchase the lands and part with the consideration paid therefor. That the plaintiffs should not be confined to their remedy to sue for damages for a breach of the covenant of warranty contained in their deed is not free from doubt. The averments of the complaint are sufficient to state a cause of action for breach of covenant, so that in any event the demurrer should be overruled. Still the question of determining whether a cause of action for deceit will lie is not entirely an academic one, as the rule of damages may be different in the two classes of actions. In the absence of actual fraud, the plaintiffs, in suing on a breach of covenant, would only be entitled to such a fractional part of the whole consideration paid as the value of the timber at the time of the purchase bore to the whole purchase price, with interest thereon. *Docter v. Hellberg,* 65 Wis. 415, 424, 27 N. W. 176, and cases cited. Whether this rule does not also extend to actions brought on covenants where actual fraud has been perpetrated need not be decided, in view of the conclusion reached as to the character of the cause of action stated.

The federal supreme court has held that representations made in good faith as to title become merged in a deed subsequently given containing a covenant of warranty, and that the action must be brought on the covenant. *Andrus v. St.*

Louis S. & R. Co. 130 U. S. 643, 9 Sup. Ct. 645. This case is followed in *Farrar v. Churchill,* 135 U. S. 609, 10 Sup. Ct. 771, and in *Wright v. Phipps,* 90 Fed. 556, which is affirmed without discussion by the court of appeals of the Second circuit (98 Fed. 1007, 38 C. C. A. 702).

The precise question here involved was before the court in *Ward v. Wiman,* 17 Wend. 193. A fraudulent representation as to title was made by the vendor and relied on by the vendee. The lands were conveyed by deed of warranty, and an action for deceit, based on the fraudulent representation, was instituted. The defense was interposed that suit could only be maintained on the covenant, because the oral representation became merged in the covenant in the deed. The court held that the fraud was "not merged nor extinguished by the covenant, but affords an additional and more complete remedy to the party." Other New York cases to the same effect are *Wardell v. Fosdick,* 13 Johns. 325, and *Krumm v. Beach,* 96 N. Y. 398, 406. Other cases which follow the New York rule are *Watson v. Atwood,* 25 Conn. 313; *Eames v. Morgan,* 37 Ill. 260; *Claggett v. Crall,* 12 Kan. 393, 397. The cases are numerous which hold that an action may be maintained on fraudulent representations orally made as to title where a conveyance has thereafter been executed and delivered, although the question of merger is discussed in but a few of them. They are collated in note 35, 11 Cyc. 1068. The rule deduced from the decisions so cited is stated in the following language:

"If the representations are known to be false when made, and have produced damage to the opposite party, the subsequent consummation of the agreement will not shield the grantor, whether there are covenants in the deed or not."

It would seem to be sound in principle to hold that the doctrine of merger should not apply in a case involving actual fraud. It is here alleged that the agent of the defendant not only represented that he had good title to the lands, but he

specifically stated that the timber thereon would become the property of the plaintiffs if they purchased, and that defendant owned it and had a good right to sell it. It is further alleged that such agent knew the representations to be false and fraudulent when he made them. Actual fraud is therefore shown by the complaint and admitted by the demurrer. A tort was committed, assuming the averments made to be true. The rule of damages, as well as the remedy for the enforcement of the right, may be different in a tort action from one on contract. *Huganir v. Cotter,* 102 Wis. 323, 78 N. W. 423. We think it is a salutary rule to hold that where, as here, actual fraud is alleged, the fraudulent oral representation as to title is not merged in the covenant of warranty contained in the deed subsequently given. We do not understand that the federal decisions cited lay down any different rule. The doctrine of those cases seems to be confined to representations made in good faith, and does not extend to representations known to be fraudulent when made.

We therefore hold that the complaint states a cause of action for damages for deceit arising out of the fraudulent representations alleged and which induced the plaintiffs to make the purchase. We do not determine how or to what extent the plaintiffs' rights are affected by sec. 2241, Stats. (1898), if the evidence should show that the deed or land contract to plaintiffs was recorded before the vendees in the timber deed went into possession or recorded their deeds. Such a situation may not arise. We have not been favored with any argument or citation of authority upon the point by respondents' counsel, and with very little by counsel for the appellant. It being unnecessary to decide the question, the court feels that it should not be passed upon until it is more fully argued.

By the Court.—Order affirmed.

GIERCZAK, Respondent, vs. NORTHWESTERN FUEL COMPANY, Appellant.

February 23—March 15, 1910.

(1) *Stay of proceedings: Failure to pay costs: Discretion.* (2–8) *Master and servant: Injuries: Unsafe working place: Assumption of risk: Notice: Negligence of fellow-servant: Instructions to jury.* (9, 10) *Evidence: Witnesses: Cross-examination.*

1. Where, upon a motion to stay proceedings until payment of a judgment for costs rendered against the plaintiff in a previous action for the same injuries which had been voluntarily dismissed by him, it appeared that the dismissal resulted from an unexpected situation developed at the trial and was in good faith and that plaintiff has been and is unable to pay the judgment and support his family, the question was one addressed to the sound discretion of the court, and refusal of the stay was not an abuse of such discretion.
2. An employee does not assume a risk unless he knows it or the circumstances are such that one in the exercise of ordinary care ought to know it.
3. An adult employee of experience and ordinary intelligence who knows or ought to know that a steel rope is likely to fall from a considerable height into his working place, necessarily knows or ought to know the danger of injury therefrom and cannot escape the consequences of such knowledge by claiming that he did not appreciate the danger or the risk.
4. Where a shoveler working in the hold of a vessel from which coal was being unloaded was injured by the fall of a steel rope which regularly fell at a certain stage of the work as the result of a change then made in the hoisting apparatus, and there was evidence that notice of the fall of the rope had always been given on previous occasions so far as he knew, but that it was not given at the time in question, it cannot be said as matter of law that he assumed the risk.
5. Failure, in such case, of the foreman in charge of the unloading operations to give notice or warning of the fall of the rope was not merely negligence of a co-employee, where the employer had not, by rule or otherwise, made any provision for warning being given of the constantly recurring danger.
6. In such a case, where the only negligence consisted in lack of warning, for which no provision had been made, an instruction

that the officers and agents in charge of defendant's business of unloading coal from vessels to docks stood for and represented the defendant, was not erroneous.

7. An instruction that if defendant failed to use such care to provide plaintiff with a safe place to work as the great mass or majority of *employers* under similar circumstances would ordinarily use, then the place furnished was not reasonably safe, was not erroneous in that the word "employers" was used instead of "mankind."

8. It was proper in such case to instruct the jury that, in determining whether defendant furnished a reasonably safe place to work, the jury might consider the opportunity or lack of opportunity to guard and protect men working in the hold of the vessel, the precautions taken in that regard, the nature of the appliances above the hatchway, the manner of making the change in the apparatus, the fact that no rules as to warning the men of the change had been made, and that no warning was in fact given to the plaintiff.

9. How far a party may properly be permitted to cross-examine his own witness when there is manifest reason to be surprised by his testimony (especially if the witness be identified in interest with the adverse party) is a matter largely in the discretion of the court, and that discretion will not be reviewed on appeal except in case of abuse.

10. In an action for injury to one who was struck by a falling steel rope it was not error to permit a dentist who treated plaintiff's broken teeth to state whether it would take a light or heavy blow to leave the mouth in the condition in which he found it, it being undisputed that the blow was a heavy one.

APPEAL from a judgment of the circuit court for Bayfield county: A. H. REID, Judge. *Affirmed.*

Personal injuries. The plaintiff was a man of ordinary intelligence, forty-seven years of age, who at the time of his injury had been employed by the defendant as a coal shoveler at its large coal dock at the city of Washburn for nine years. On the 6th of September, 1907, he was engaged shoveling coal into a large bucket in the hold of a large vessel lying at defendant's coal dock, when the end of a half-inch steel wire rope fell down through the hatchway and struck him in the face, knocking out several teeth and inflicting other injuries. The fall of the rope came about in this way: In order to rap-

idly unload the boat, a long boom extends out from and about thirty-five feet above the dock to a point above the middle of the hatchway of the boat. On the end of the boom is a pulley or sheave through which the steel rope in question runs to a large drum, which is operated by a hoister in a shanty on the dock. During the early stages of the unloading of the boat, large clam shells (so called) are attached to the steel rope and lowered into the hold, which automatically load themselves and are drawn up to the end of the boom, and then pulled back by a sort of a carriage running on the boom back into the yard and emptied. When the coal is nearly gone in the hold, the clam shells are detached because they will no longer load themselves, and large buckets are substituted. This operation takes about half an hour, and in course of it the end of the steel rope has to be drawn through the pulley by men on the dock and always falls down into the hatchway if a boat be at the dock, or into the water if there be no boat there. At the time of the accident the clam shells had been taken off and the steel rope was being pulled out of the pulley, and in course of this operation the end of it fell down into the hatchway. No warning was given of its approaching fall. The foregoing facts are all without dispute.

The jury returned a special verdict finding (1) that the defendant did not furnish the plaintiff with a reasonably safe place to work; (2) that this failure was a proximate cause of plaintiff's injury; (3) that defendant was negligent in failing to warn plaintiff of the expected drop of the rope; (4) that such negligence was a proximate cause of plaintiff's injury; (5) that plaintiff did not know and appreciate, before his injury, the danger to which he was subject by the process of changing from clam shells to buckets; (6) that he could not have known or appreciated such danger before his injury by the exercise of ordinary care; (7) that no want of ordinary care on plaintiff's part proximately contributed to his injury; and (8) that his damages were $1,200.

The defendant moved to reverse the answers to the various

questions and for judgment on the verdict as corrected, also that the verdict be set aside and a new trial granted, but all the motions were denied and judgment rendered on the verdict for the plaintiff, from which judgment defendant appeals.

For the appellant there was a brief by *Solon L. Perrin* and *John Walsh,* and oral argument by *Mr. Perrin.*

For the respondent there were briefs by *Sanborn, Lamoreux & Pray* and *Horace B. Walmsley,* and oral argument by *F. B. Lamoreux.*

WINSLOW, C. J. It appears that the plaintiff brought a previous action for the same injury and voluntarily dismissed the same upon the trial and has never paid the judgment for costs which followed the dismissal. Upon an affidavit showing these facts, the defendant at the opening of the trial of the present action moved that the proceedings herein be stayed till such judgment was paid, but the court overruled the motion. Whether this motion and the order thereon should not have been preserved in the bill of exceptions in order to be reviewed on appeal we do not find it necessary to decide. Even conceding the order to be an intermediate order which may be reviewed without exception under sec. 3070, Stats. (1898), still we cannot say that error was committed in denying the motion, because it appears by supplemental return that upon the hearing of the motion affidavits were presented to the court tending to show that the dismissal of the former action resulted from an unexpected situation developed upon the trial, and was made in good faith and not prompted by any intention to harass the defendant, and, further, that the plaintiff has been and is absolutely unable to pay the former judgment and support the family dependent upon him. Under such circumstances, the question whether the action should be stayed until the costs of the former action be paid was a question addressed to the sound discretion of the court, and we cannot say that any abuse of

discretion appears in the present case. *Odegard v. North Wis. L. Co.* 130 Wis. 659, 110 N. W. 809.

The general contention that a verdict for the defendant should have been directed either because the plaintiff assumed the risk as matter of law, or because the injury was the result of the negligence of a fellow-servant in failing to give plaintiff warning that the rope was about to fall, cannot be sustained. The evidence showed or tended to show that every time the change was made from clam shells to buckets the end of the steel rope necessarily fell into the hold of the ship, a distance of some sixty feet, and that the men who were shoveling in the hold could not ordinarily tell when it was about to fall; that the company had made no rule making it the duty of any person to give notice of the expected fall; that Love, the foreman of the unloading operations, at times did give notice of the fall; and that whenever the plaintiff had seen the line fall before the present occasion the foreman had always given notice. It was undisputed that notice was not given on the present occasion. In this condition of the evidence it cannot be said that the plaintiff assumed the risk, because one must know a risk, or the circumstances must be such that one in the exercise of ordinary care ought to know a risk, before he can assume it. If notice of the fall of the cable had always previously been given so far as plaintiff was informed, and such notice was omitted at the time in question, it cannot be justly said as matter of law that plaintiff either knew or ought to have known of the risk. Nor can Love's failure to give notice be called merely the negligence of a fellow-servant, for the reason that the defendant had utterly failed to promulgate any rule or make any arrangement for the protection of its employees against this serious danger which resulted from this regular and ever recurring fall of the cable. Had it provided for a competent employee to give warning to other employees of this dangerous movement of the cable, it would doubtless not be liable for the

negligent failure of such employee to give the notice or warning; but where it makes no provision for warning, and the danger is one which, under the rules of reasonable care, it should provide against by providing for notice or warning by a competent person in advance, then the failure of some co-employee to voluntarily give notice is not negligence of the co-employee, but negligence of the master. *Portance v. Lehigh Valley C. Co.* 101 Wis. 574, 77 N. W. 875; *Bain v. N. P. R. Co.* 120 Wis. 412, 98 N. W. 241.

Some detail errors are alleged which will be briefly taken up. Mr. Love, the foreman of the dock operations, under whom plaintiff worked and who was still in defendant's employ, was called as a witness by the plaintiff, and the court allowed plaintiff's counsel to ask him several questions in the nature of cross-examination as to his testimony given upon the trial of the former action. This was objected to, and is now assigned as error. It appears by examination of the record that there was certainly fair ground to claim that plaintiff's counsel were surprised by some variations between the witness's testimony on this trial and that given on the former trial. While the general rule is that a party is not to impeach his own witness, the question as to how far counsel may be properly permitted to go by way of cross-examination of a witness when counsel manifestly have good reason to be surprised by his evidence (especially if the witness be identified in interest with the adverse party) is one resting largely in the discretion of the trial court, and that discretion will not be reviewed here except in case of abuse.

The dentist who treated the plaintiff and extracted the roots of the broken teeth was allowed to answer the question whether it would take a light or heavy blow to leave the mouth in the condition in which he found it. There was no error in this. All the evidence shows that the blow was a heavy one. There was really no dispute about it.

The court instructed the jury that the officers and agents

in charge of the defendant's work and business of unloading coal from vessels to the docks stood for and represented the defendant. This is alleged to be error because it might be inferred therefrom that any man in charge of any part of the work represented the defendant, and that the defendant was liable for his negligence. Had it appeared that the defendant had imposed the duty of warning on Love or some other superior employee, the objection might have weight, for then, doubtless, the inference might be drawn that the negligence of such officer was the negligence of the defendant, when in fact it would be but the negligence of a co-employee; but as it appeared without dispute that the defendant never promulgated a rule requiring warning, and really the only negligence consisted in lack of warning, the instruction could do no injury. The neglect of the officers in charge was the neglect of the defendant itself.

The court charged that if the defendant failed to use such care and caution to provide the plaintiff with a safe place to work as the great mass or majority of *employers* under similar circumstances would ordinarily use, then the place furnished was not reasonably safe. It is contended that the word "mankind" should have been used instead of "employers." The objection is plainly untenable. As employers are the only people out of the great body of mankind who furnish employees places to work, they necessarily are the only people with whose conduct the defendant's conduct can be compared. Where the quality of an act which all mankind performs is under consideration, the test is doubtless that care which the great mass of mankind ordinarily exercises under like circumstances; but, if the act be one which only a part of mankind performs, then the test must be the care which the great mass of people called upon to perform that act ordinarily exercise.

In instructing the jury upon question No. 1 the court told them that they might take into consideration the opportunity or lack of opportunity to guard and protect the men working

in the hold, the precautions taken in that regard, the nature of the appliances above the hatchway, and the manner of making the change from clam shells to buckets, the fact that no rules as to warning the men of the change had been made, and that no warning was in fact given to the plaintiff. Various arguments are advanced to show why these matters were improper to be considered in deciding whether the place was reasonably safe or not. But the arguments do not impress us as carrying any weight. It seems to us that the considerations above mentioned were eminently fit to be considered by the jury. There are no other errors assigned which are deemed to require discussion.

While no error is assigned as to the form of questions Nos. 5 and 6, and therefore no question as to their correctness is before us, we deem it proper to call attention to the fact that within the decisions of this court they are inaccurate in such a case as the present. This is the case of an experienced man of ordinary intelligence and brightness. If he knew or ought to have known that the steel rope might fall, he necessarily knew or ought to have known all the probable consequences of such fall, for there could be nothing uncertain or occult as to such consequences. Under such circumstances the danger is open and obvious; and when the danger is open and obvious, free from uncertainty or obscurity, and the servant of mature years and of ordinary intelligence, he assumes the risk when he knows or ought to know that danger. There is no room, then, for him to escape the consequences of his knowledge by claiming that he did not comprehend or appreciate the danger or the risk. If he knows, he must appreciate. *Sladky v. Marinette L. Co.* 107 Wis. 250, 83 N. W. 514. Where a young and inexperienced employee is injured by some danger of which he has had no instruction or warning, it is frequently proper to inquire whether he comprehended or appreciated the risk, especially if there be obscurity or complexity in the situation, as it may well be that,

while knowing in a general way that there is some danger, he does not appreciate or comprehend its extent or gravity, and so ought not to be held in justice to have assumed the risk. *Chopin v. Badger P. Co.* 83 Wis. 192, 53 N. W. 452; *Wankowski v. Crivitz P. & P. Co.* 137 Wis. 123, 118 N. W. 643.

Attention is called to these two rules in this case, not because there can be any reversal here on account of the erroneous form of the questions, but rather to caution trial courts in the future.

By the Court.—Judgment affirmed.

STREHLAU, Appellant, vs. JOHN SCHROEDER LUMBER COMPANY, Respondent.

February 23—March 15, 1910.

Master and servant: Injury: Unsafe working place: Erection of building: Negligence of fellow-servant.

1. Where a master furnishes to a force of employees suitable material to erect a building upon a proper site he is not liable for injuries to one of them resulting from perils created by them in the progress of the construction.
2. The fall of a loose plank placed near the edge of the floor on the second story of a building in process of erection was not of itself *prima facie* evidence that the place was unsafe, the rule *res ipsa loquitur* being equally effective to establish that the fall of the plank might have been due to the negligence of co-employees of the person injured.

APPEAL from a judgment of the circuit court for Ashland county: E. C. HIGBEE, Judge. *Affirmed.*

In December, 1908, defendant was erecting a sawmill 196 feet long north and south by sixty feet wide by the labor of its own employees. The work had progressed so that at least part of the timbers of the second floor were in place, and a

strip of flooring some four to six feet wide had been laid southerly from the north end about the middle of the building for the purpose of a runway to carry back timbers, presumably for the further construction of that floor. At the south end of the building and opposite this runway a tackle had been rigged by attaching the same to what is called a gin-pole, and a force of men were engaged in bringing timbers from outside the building to the foot of this tackle and raising them to the second floor, nineteen feet above the ground, and carrying them northerly along the runway to be placed in the building. Plaintiff at that time was employed in hauling the timbers with a mule to the foot of the tackle, where other men fixed a chain to each timber, raised it above the second floor, where two men drew it back onto the floor, where it was dropped. This work had been going on from three to five days. The men who received the timber on the second floor had laid a block or plank two by six upon the floor near the south edge in order that the timber, when on the floor, should lie upon such block or plank and thus be sufficiently raised from the floor to permit disengagement of the chain with which it had been raised. There is no evidence that the master had either provided this block or plank for the purpose, or had directed its use further than that the foremen were frequently in the vicinity and had opportunity to use it. It at all times lay loosely on the floor, and on the 15th day of December it in some undisclosed way was precipitated over the edge and fell to the ground, striking plaintiff and causing him injury, for which this suit was brought charging defendant with negligence in placing said block on the second story floor and neglecting to fasten the same and thereby in failing to provide a safe place for plaintiff to work; also in failing to notify him of its unsafety. At the close of the evidence the court entered judgment of nonsuit, from which plaintiff appeals.

For the appellant there was a brief by *Eaton & Eaton*, at-

torneys, and *Collins & Eaton,* of counsel, and a reply brief signed by *Eaton & Eaton;* and the cause was argued orally by *M. H. Eaton.*

For the respondent there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

DODGE, J. The evidence, in which there is very little dispute, is conclusive against either negligence or any failure of duty on the part of the defendant. The situation is the usual one of an entirely safe place—that is, a proper site—being furnished to a force of employees upon which they are to construct a building with materials in which no defect or unfitness is suggested. Of course, as the work upon which they are mutually engaged progresses, perils arise. The moment any timber is elevated from the ground there is a degree of unsafety, for it may drop or swing to the injury of some of the men. But the duty of the master to supply a reasonably safe place to work has no application to the dangers thus created, for the unsafety of the place arises not from the acts of the master, but from those of the very force of co-employees. The situation presented in this case, where several timbers had been erected and a floor commenced to be laid at some elevation, differs not at all in principle from that above suggested when the first timber is raised from the ground. The rule of nonliability of the master for perils thus created in the progress of construction or repair of buildings is established by multitudinous authority. *Porter v. Silver Creek & M. C. Co.* 84 Wis. 418, 54 N. W. 1019; *Larsson v. McClure,* 95 Wis. 533, 70 N. W. 662; *Mielke v. C. & N. W. R. Co.* 103 Wis. 1, 79 N. W. 22; *Liermann v. Milwaukee D. D. Co.* 110 Wis. 599, 86 N. W. 182; *Kath v. Wis. Cent. R. Co.* 121 Wis. 503, 99 N. W. 217; *Williams v. North Wis. L. Co.* 124 Wis. 328, 102 N. W. 589; *Walaszewski v. Scholnecht,* 127 Wis. 376, 106 N. W. 1070; *Hoveland v. Nat. B. Works,* 134 Wis. 342, 114 N. W. 795. In the light of these

authorities it is entirely obvious that the conditions which caused the place where plaintiff worked to be unsafe were not provided by the master, but had been created by the very force of men of which plaintiff was one, for they were all engaged in the common work of moving these timbers from their place in the yard to the places where they were to be framed into the building and in framing them.

A somewhat different phase of negligence is suggested by the complaint and urged by appellant, namely, that the placing of the block or plank near enough to the edge of the floor and failure to fasten it by nails, so that it might be expected to be precipitated over the edge, was negligence on the part of defendant. This contention is likewise negatived by the undisputed evidence, which shows that all of said acts were done by co-employees.

The fall of the timber, it is argued, was of itself *prima facie* evidence of an unsafe situation or condition. This, however, overlooks the fact that its precipitation may have been caused as well by negligence of those who were handling the timbers as by reason of a negligently unsafe condition; hence the rule *res ipsa loquitur* is equally effective to establish that the fall of the timber may have been due to negligence of co-employees for which the master would not be liable. *Musbach v. Wis. C. Co.* 108 Wis. 57, 84 N. W. 36. Further than this, however, the evidence is entirely conclusive, as already stated, that, whatever the condition was, it was created by acts of co-employees in the process and prosecution of the construction of the mill. For these reasons the trial court properly ordered judgment of nonsuit.

By the Court.—Judgment affirmed.

STOCK, Respondent, vs. KERN, Appellant.

February 23—March 15, 1910.

Master and servant: Injury from dangerous machinery: Assumption of obvious risks: Proximate cause: Burden of proof.

1. **Dangers incident to the operation of a machine which are open and obvious to any person of ordinary intelligence are assumed by a servant who undertakes the employment of operating it.**
2. **The fact that a machine whose operation was attended with obvious danger might possibly have been equipped with appliances which would render it less dangerous affords no ground for complaint to one who undertook to operate it, the employer having the right to use such a machine if he thereby violated no positive law and did not expose his employees to hidden dangers.**
3. **In an action for an injury sustained by an employee while operating an obviously dangerous machine the burden is upon plaintiff to show that the injury was proximately caused by the alleged negligence of the defendant; and proof which is as consistent with a theory that the injury was due to a cause not actionable as with a theory that it was due to an actionable cause is not sufficient to carry the case to the jury.**
4. **The evidence in this case is *held* not to show a causal connection between the alleged negligence of the defendant in running at a slow speed the splitter saw at which plaintiff was working and the injury to plaintiff occasioned by the turning of a stave bolt which he was feeding into the saw and by his hand slipping and coming in contact with the saw.**

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action to recover damages for an injury to plaintiff's right hand, alleged to have been caused by the negligence of the defendant. At the time the injury was received the plaintiff was twenty-eight years old. He had lived on a farm until he was twenty-one, and thereafter had worked one winter in the woods, and subsequently had fired in the Glidden Veneer Factory. For five years he had fired in the factory, and when not so busied he worked about the town or in the

mill as a laborer. He had worked at a veneer saw in the mill off and on some eight months in all. This was the only machinery, except farm machinery, at which he had worked prior to the time of the accident. The veneer saw was about sixteen inches in diameter. It was used to cut logs into veneer. This was accomplished by putting the log into a vise, when by means of a lever the log and the saw would be brought together and the revolving saw would cut off veneer of the thickness desired.

The defendant's stave mill and millyard were in the entire charge of his foreman, who, on the day previous to that on which plaintiff's injury was received, employed the plaintiff and offered him his choice of several jobs. Plaintiff chose the job of operating a "splitter" machine, which would pay him best. The foreman had known the plaintiff for several years and had worked in the veneer factory with him. Essentially, the splitter consists of a large circular saw thirty-eight to forty inches in diameter, mounted upon a framework and connected with the power of the mill so as to revolve toward the operator. The saw projects eighteen or twenty inches above the table. Big bolts from the cut-off saw were placed upon the table lengthwise, held firmly by the operator, and pushed by him against the saw. These big bolts, ordinarily ten or twelve inches in diameter, were to be cut into smaller ones and the slabs were to be taken off. The smaller bolts thus produced were of various sizes, depending upon the size of the big bolts which were to be split up.

Plaintiff went to work on the morning of January 22, 1908. An employee of the defendant, while plaintiff was observing him, cut some of the big bolts in order to show the plaintiff how to operate the splitter saw, and plaintiff then went to work. He had worked for a little over an hour when he took up a tamarack bolt, about five and one-half inches in diameter and thirteen inches long, to feed it into the saw. He sawed about one and one-fourth inches into the bolt, when it turned

and slipped out of his hand. His hand was thrown against the saw. Two fingers were cut off, and a third finger, which was cut into, has become stiffened and cannot be closed.

The complaint alleges negligence on the part of the defendant in several respects. The machine is alleged to have operated defectively by reason of the defective character of the belt by which the machine was connected with the power shafting. It is claimed that the belt slipped on the pulleys by which power was transmitted to the machine, because of the material of which the belt was made, and also because the belt was too loose, thus causing an irregular movement of the machine. It is also alleged that the saw was operated at too slow a speed, and that this rendered the operation of the saw more difficult and dangerous to the operator and caused his hand to come into contact with the saw. The alleged icy condition of the bolt which plaintiff was cutting and the absence of a guide or a clamp upon the machine are alleged as negligences on the part of the defendant.

The jury found that the plaintiff did not know the safe manner of operating the machine; that he had not been instructed as to such manner of operating it; that the splitter machine was not reasonably safe as equipped with appliances for operation; that the speed of the saw was so slow as to be dangerous; that these various negligences were each a proximate cause of the plaintiff's injury; that the plaintiff did not assume the risk of the employment; and that the plaintiff was entitled to $1,200 as damages. This is an appeal from the judgment on the verdict.

For the appellant there was a brief by *Lamoreux, Shea & Cate,* and oral argument by *W. F. Shea.*

W. Stanley Smith, for the respondent.

SIEBECKER, J. The jury found that the splitter machine, as equipped and operated, was not a reasonably safe one for the purpose for which it was used; that the speed of the saw,

as operated at the time the plaintiff was injured, was so slow as to render it dangerous to the plaintiff, who was operating it; that the plaintiff was ignorant of such dangers; and that the defendant failed to instruct or warn him as to the dangers incident to the operation of the machine. The appellant contends that the court erred in refusing to direct a verdict for the defendant, upon the grounds that there was no evidence showing negligence in any of the respects alleged, and that the plaintiff's injury resulted from open and obvious dangers incident to the operation of the saw in defendant's business. The evidence shows that the plaintiff was operating the splitter saw, and that after he had worked a little over an hour feeding it he was running a bolt through the saw, when it turned, his hand slipped, came in contact with the running saw, and was injured to the extent above stated. There is evidence that the operation of the machine, as constructed, was attended with dangers to the operator feeding bolts into the saw, but so far as disclosed these dangers existed in a liability that the operator's hands would come into contact with the revolving saw while he was feeding it as usual. It is manifest that such dangers were incident to the operation of the machine and were open and obvious to any person of ordinary intelligence. The fact that the machine might possibly have been equipped with guides and carriages and thereby have been rendered less dangerous affords no ground for complaint under the circumstances shown, for the reason that the defendant had the right to conduct his business and use this machine as he did, provided he thereby violated no positive law and did not expose his employees to hidden dangers. Where a servant undertakes an employment under such conditions he assumes all the obvious dangers and hazards. *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671; *Faber v. C. Reiss C. Co.* 124 Wis. 554, 102 N. W. 1049; *Schmitt v. Hamilton Mfg. Co.* 135 Wis. 117, 115 N. W. 353.

It is contended that the evidence tends to show that the defendant was negligent in not running the saw at a sufficiently

high speed to render its operation reasonably safe; that the danger incident thereto was hidden and unknown to the plaintiff; that he had not been warned of the danger; and that, since the jury found the default of the defendant in this respect to have been the proximate cause of the injury, the defendant must be held to have been guilty of actionable negligence. If it be assumed that the defendant was negligent in this respect, we still find no established ground showing that the defendant is liable, for the evidence fails to show that such alleged negligence caused plaintiff's injury. As above stated, the accident was occasioned by the bolt turning while the plaintiff had hold of it and was feeding it into the saw and by his hand slipping and coming in contact with the saw. What caused the bolt to turn and plaintiff's hand to slip is a matter of speculation and conjecture in the light of the evidence. Plaintiff asserts that it was the slow speed of the saw; but the visible and external facts and the accompanying circumstances fail to show any such causal connection. There is nothing in the nature of the situation or of the surrounding conditions to indicate that the slow speed of the saw turned the bolt or produced a condition which brought about this result. Counsel has not pointed out why or how the speed of the saw turned the bolt and thus produced the injury, nor do we perceive anything in the accompanying circumstances which tends to establish a causal connection between the speed of the saw and the turning of the bolt. We are led to the conclusion that the court erred when the jury were instructed that the evidence permitted of an inference that the slow speed of the saw was the proximate cause of the plaintiff's injury. The burden rested on the plaintiff to show with reasonable distinctness that the injury was proximately caused by the alleged negligent conduct of the defendant.

"This burden is not met by proof which is as consistent with a theory that . . . [the injury] was due to a cause not actionable as with a theory that it was due to an actionable cause, and in such a state of the proof the case fails to come

within the proper province of the jury." *Schell v. C. & N. W. R. Co.* 134 Wis. 142, 113 N. W. 657; *Hyer v. Janesville*, 101 Wis. 371, 77 N. W. 729.

Upon the record, we are constrained to hold that there was no evidence upon any of the alleged grounds of negligence to carry the case to the jury, and that the motion for a verdict in defendant's favor should have been granted.

By the Court.—The judgment appealed from is reversed, and the cause remanded with directions to award judgment dismissing the action.

ZIEMER, Respondent, vs. C. G. BRETTING MANUFACTURING COMPANY, Appellant.

February 23—March 15, 1910.

Corporations: Master and servant: Liability for injury: Pleading: Admissions in answer: Estoppel: Business formerly conducted under same name by individual.

1. Where a complaint alleges that plaintiff was injured on a certain date while he was in the employ of defendant, that the defendant is a corporation, and that on said date it owned and operated the foundry in which the injury occurred, admissions in the answer that defendant is a corporation and that plaintiff was injured at the time and place alleged are consistent with proof that, even if incorporated prior to the date mentioned, defendant was not then doing business nor the owner of nor operating the foundry in question, and that plaintiff was not then in its employ.
2. The admission in such case by the president of the defendant corporation, when notice of injury was served upon her, that she was such president, does not estop defendant from denying liability upon the ground that at the time of the injury it was not operating the foundry in question; and the mere fact that the name of the corporation is the same as that under which the foundry had been formerly conducted by its president as an individual does not render the corporation liable, where plaintiff was not in any way misled as to the identity of his employer either by the president or by any other member of the corporation.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This action was brought to recover for personal injuries alleged to have been sustained by plaintiff on the 19th day of June, 1907, while in the employ of the defendant. The complaint contains the following allegation:

"Upon information and belief, the defendant is a corporation duly incorporated under and by virtue of the laws of the state of Wisconsin, doing business at the city of Ashland, in said state, under the corporate name of the *C. G. Bretting Manufacturing Company,* and that on the 19th day of June, 1907, and for a long time prior thereto, the said defendant was the owner of and operated a foundry at the said city of Ashland, in said state, wherein certain kinds of machinery, wheels, and castings were made."

The complaint then goes on to state the negligence of defendant which caused plaintiff's injury, and demands judgment for $7,500. The defendant answered as follows:

"The defendant above named, for its amended answer to the amended complaint herein, admits that it is a corporation duly organized under the laws of the state of Wisconsin and that the plaintiff was injured at the time and place stated in said amended complaint; and defendant avers that the injury received by plaintiff mentioned in the complaint was caused by the negligence of the plaintiff and that of a fellow-servant, and not otherwise. Defendant denies each and every allegation of the complaint not herein specifically admitted."

A trial was had on the issues joined and a general verdict found in favor of the plaintiff for $1,700 damages. Judgment was rendered on the verdict in favor of the plaintiff and against the defendant, from which this appeal was taken.

For the appellant there was a brief by *Lamoreux, Shea & Cate,* and oral argument by *W. F. Shea.*

For the respondent there was a brief by *Eaton & Eaton,* and oral argument by *M. H. Eaton.*

KERWIN, J. The first proposition argued by appellant is that at the time of the injury the plaintiff was not in the em-

ploy of the defendant. If this proposition be sustained it is clear that the judgment below must be reversed and no other question discussed need be considered. It is established in the case that C. G. Bretting owned and operated the foundry in question from 1901 to 1904, at which latter date he died, and afterwards his widow, Jane Bretting, was appointed administratrix of his estate, and continued to run and operate the foundry as such administratrix until September 25, 1907. Said Bretting operated the foundry under the name of C. G. Bretting Manufacturing Company, and the administratrix, Jane Bretting, continued to operate it as such administratrix up to the 25th day of September, 1907, under the same name. It is contended on the part of counsel for respondent that the defendant became a corporation on the 16th day of March, 1907, by virtue of the filing of the articles of incorporation with the register of deeds in accordance with sec. 1772, Stats. It is probable that counsel overlooked the amendments to this section, namely, ch. 238, Laws of 1901, and ch. 507, Laws of 1905. Sec. 1772, as amended, requires the original articles or a true copy thereof properly verified to be filed with the secretary of state, and a like verified copy and certificate of the secretary of state to be recorded by the register of deeds of the county in which the corporation is located, and that the corporation shall have no legal existence until such articles be left for record. The evidence is not clear whether the statute has been complied with so as to establish the fact that the corporation had legal existence on the 16th day of March, 1907, or at any time prior to the 25th day of September, 1907. But, in any event, this is not material in our view of the case, because it is perfectly clear from the evidence that the corporation did not organize, do business, or have any assets before the month of September, 1907, and it is equally clear that it did not purchase, take over, operate, or have any interest in the foundry in question prior to September, 1907. So the plaintiff at the time of the in-

jury was not in the employ of the defendant, but in the employ of the administratrix of C. G. Bretting, deceased; therefore there could be no liability on the part of the defendant for any negligence of the administratrix, unless the liability was in some way assumed or taken over by the defendant corporation, of which there is no evidence whatever in the record.

It is contended, however, on the part of counsel for the respondent, as we understand their argument, that the defendant is liable because of allegations in the complaint admitted by the answer and also on the ground of estoppel. The complaint alleges that the injury occurred on June 19, 1907, while the plaintiff was in the employ of the defendant, and further, that the defendant "is a corporation organized under the laws of the state of Wisconsin," and that, since this allegation respecting corporate existence is admitted in the answer, the defendant is estopped from denying that it was a corporation at the time of the alleged injury. But the allegations of the complaint admitted by the answer are perfectly consistent with the established facts, namely, that even if the corporation was organized in March, 1907, still it was not doing business, nor owner of nor in charge of the foundry, at the time of the injury, but that at such time the administratrix was operating it and employed the plaintiff. True, after the corporation was organized, and on the 25th day of September, 1907, it took charge of the foundry plant as such corporation, but there is nothing whatever in the record tending to show that it assumed the liability, if any existed, against the administratrix while she operated the plant, and, in the absence of such showing, clearly the liability complained of was not a liability against the defendant. It also appears that when the notice of injury was served on the 10th day of October, 1907, Jane Bretting, who had prior to the 25th day of September, 1907, operated the plant as administratrix, admitted that she was president of the defendant,

and the notice was served upon her. But this admission is no evidence of estoppel, because, as the record shows, she was at that time and after September 25, 1907, president of the corporation. It will be seen that the corporation adopted the name of *C. G. Bretting Manufacturing Company,* which C. G. Bretting and the administratrix had operated under. This obviously was done for business reasons, so that the corporation might do business in the same name under which the foundry had been operated prior to the transfer to the corporation. The fact that the corporate name was the same as that under which the business had formerly been run may have influenced the plaintiff in not investigating as to who employed him, whether a corporation or an individual, and he may have assumed that he was in the employ of a corporation. But this failure of diligence on his part cannot be charged to defendant. There is nothing whatever in the record going to show that the plaintiff was misled in any way either by the administratrix, who was then operating the business, or by any of the subscribers to the articles of incorporation. So we see no escape from the conclusion that since the plaintiff was not in the employ of the defendant, and nothing being shown establishing any liability on the part of the defendant for the alleged cause of action complained of, the plaintiff cannot recover upon the showing made. It may be that upon another trial the plaintiff can establish that the defendant corporation assumed the liability in question, if any existed, or otherwise became liable. We have therefore concluded to send the case back for a new trial. It follows from what has been said that the judgment of the court below must be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

HOEPPNER-BARTLETT COMPANY, Appellant, vs. CITY OF RHINELANDER, Respondent.

February 24—March 15, 1910.

Municipal corporations: Contracts for school buildings: Validity: Compliance with statutes: Board of public works: Substitution of school board: Ratification by acceptance of building.

1. A contract for the erection of a schoolhouse for a city of the fourth class, which, in disregard of statutory requirements, was entered into by the school board instead of by the board of public works and was not countersigned or indorsed by the comptroller nor signed on behalf of the city by the mayor and city clerk, was not valid or binding upon the city.
2. A resolution adopted by the common council in such case, authorizing the school board to construct the schoolhouse, was not a valid substitution of the school board for the board of public works, where the council at no time determined, pursuant to sec. 925—78, Stats. (1898), that the school board should constitute the board of public works, and never by any official action attempted to dispense with the board of public works and itself assume the functions of that board.
3. Acceptance of the schoolhouse by the city in such case did not operate to ratify the acts of the school board so as to make the contract binding upon the city.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed.*

Plaintiff brings action to recover on a contract for the construction of a schoolhouse alleged to have been made by it and the defendant city through the common council and the school board of the city. The defendant alleges that no valid contract was made. The court awarded judgment of nonsuit. This is an appeal from the judgment.

The cause was submitted for the appellant on the brief of *W. H. Frawley & T. F. Frawley,* and for the respondent on that of *H. F. Steele.*

SIEBECKER, J. On March 25, 1905, the common council of the defendant city adopted a resolution requesting the

board of education to have prepared and to present to the common council plans and specifications for a school building at a cost not exceeding $10,000. Thereafter the common council fixed the limit of cost at $12,000. Subsequently the council adopted a motion requesting the school board to call a meeting and to recommend plans for a school building at the next meeting of the council. On April 13, 1905, the school board adopted plans, and a communication was addressed to the council notifying the council of the action of the board and advising: "If the council wishes the school board to construct such building, that the school board be empowered to cause the same to be erected." At a meeting of the council a motion was adopted "that the report of the school board be accepted and that the school board be empowered to erect and construct such ward school building." Subsequently, at meetings of the school board, various changes were made in the plans and specifications, and on June 21, 1905, the board received the bids for which they had advertised pursuant to action taken therefor. These bids did not come within the $12,000 limit, and the building committee were therefore instructed by the board to submit the bids to the council. On June 24, 1905, the council, by resolution, authorized the board of education to construct the building according to the advertised plans and specifications and prescribed that the council would provide the necessary funds. On June 30, 1905, the school board, by motion, let the contract for the construction of the building to the plaintiff and instructed the building committee to have the contract properly drawn. The contract was executed the same day and is signed on behalf of the school board by its president and secretary. At the time the contract was executed a fund of $7,000 was available to meet the cost of the building. The building was constructed, and plaintiff has been paid various amounts as the construction proceeded.

Plaintiff brings this action to recover the balance alleged

to be due on the contract price, for extras under the contract, and also for the damages which plaintiff claims because of delays and interference with the progress of the construction under the contract. Prior to the filing of the claim with the council the school board had taken action for enforcing the penalties provided in the contract for the failure to complete the building at the time specified in the contract.

The answer of the defendant denies the execution of the contract by the defendant city. This denial of execution is based on the provisions of the general charter law applicable to cities of the fourth class. The board of public works of the city did not participate in the letting or execution of the contract; the contract is not countersigned by the comptroller; there is no indorsement by him that the necessary funds are on hand or provided for; and the contract is not signed by the mayor and city clerk in behalf of the city.

The statutory provisions prescribing how and by what officers such contracts are to be let and executed are contained in ch. 40*a*, Stats. (1898). The officers of the city to whom the statutes commit the power of erecting school buildings must perform this public function. Sec. 925—52, Stats. (1898), vests in the common council the power of erecting and constructing public buildings. If the council shall have determined to undertake such an enterprise, the estimated cost of which shall exceed $200, then such work "shall be let by contract to the lowest responsible bidder," in the manner and upon the conditions of sec. 925—90, by the board of public works or such officers as shall be designated to discharge its duties. Sec. 925—78 empowers the council by a two-thirds vote of its members to designate other public officers or another board to perform the functions and duties of the board of public works; but the record in this case discloses nothing to show that the common council of the defendant city has taken any steps to dispense with the board of public works or to designate any other public officers or any

board to exercise its functions and to perform its duties. Under these circumstances the board of public works was the only municipal agency clothed with the powers and the duty of taking the prescribed statutory steps for letting this public work in the manner and upon the conditions provided in the law. Upon compliance with the requirements of the law or a report thereof to the council, pursuant to sec. 925—91, the common council may direct the letting of the work to a competent and reliable bidder, and the contract may be executed by the mayor and clerk under sec. 925—93, which provides that it shall not be so executed "until the comptroller shall have countersigned the same and made an indorsement thereon showing that sufficient funds are in the treasury to meet the expense thereof or that provision has been made to pay the liability that will accrue thereunder." It is further provided that "no such contract shall be valid until so countersigned." Sec. 925—45.

It is manifest from the foregoing statement of the facts, and it is conceded by the appellant, that the plaintiff and the defendant wholly failed to comply with the provisions of these statutes, which provide the mode of contracting by the city. It is, however, contended that the common council had power to erect public buildings, and that its action authorizing the school board to act for the city in letting the contract was a valid substitution of the school board for the board of public works. It appears by the record of the proceedings that the council at no time determined, pursuant to sec. 925—78, that the school board should constitute the board of public works; nor did it ever by official action attempt to dispense with the board of public works and itself assume to exercise the duties and powers of such board. The city attorney, the comptroller, and the engineer were therefore the duly constituted members of the board of public works, and as such the only municipal agency authorized to perform its duties and powers. It is undisputed that they

took no steps whatever in securing the plans and specifications or the bids thereon or in the erection and construction of this public building. We also find that the requirements of secs. 925—45 and 925—93, providing that the mayor and clerk shall sign the contract after the comptroller shall have certified that provision has been made to meet the liability to accrue under it and providing for such countersigning, were wholly disregarded and omitted in this case. The necessity of complying with the provision of the statutes regarding countersigning by the comptroller in the making of contracts by the city is evident from sec. 925—45, which declares that "no such contract shall be valid until so countersigned." This legislative provision clearly made it mandatory on the city to comply with this requirement in order to make a valid contract for the erection of this public building. It is well recognized that the power of a city to make contracts is conditioned upon substantial compliance with the charter provisions on the subject.

"The general rule is that a municipality is without authority to make a contract having any vitality whatever otherwise than for the objects and in the manner prescribed by law, and that one in form entered into in any other manner than substantially that provided by law, where the provisions in that regard are coupled with a prohibition to otherwise contract, imposes no liability on the municipality, even though it is performed by the opposite party." *Chippewa B. Co. v. Durand,* 122 Wis. 85, 96, 99 N. W. 603, and cases cited; *Appleton W. W. Co. v. Appleton,* 132 Wis. 563, 113 N. W. 44.

The statutory requirements to contract for the erection of this schoolhouse are very explicit and definite, and, since they have been disregarded in the essentials pointed out, it inevitably follows that the alleged contract was of no force or validity and therefore created no binding obligation on the city.

It is, however, asserted that acceptance of the schoolhouse

by the city operated to ratify the acts of the school board and thus made the agreement a binding obligation. This amounts to the claim that the acts and conduct of the city ratified the agreement and hence that the city is liable thereon. The principle of ratification cannot apply where there is nothing in existence to ratify. Since the acts relied on are wholly insufficient to create a valid contract by the city, they cannot be made the basis for a contractual liability by virtue of an acceptance of the building. *Chippewa B. Co. v. Durand, supra.* We therefore find no grounds upon which the city can be held liable upon the alleged contract relied on in this action. The complaint is restricted to a recovery on this contract and therefore states no cause of action.

The trial court properly ruled that no contract had been proved and that the complaint should be dismissed.

By the Court.—Judgment affirmed.

BARNES, J., took no part.

DELEGLISE and others, Appellants, vs. MORRISSEY and others, Respondents.

February 24—March 15, 1910.

Wills: Probate: Competency of testator: Prior adjudication in guardianship proceedings: Costs: Fraud of proponent.

1. An adjudication in guardianship proceedings that an aged woman was incompetent to manage her own affairs, though not *res judicata* in a proceeding for probate of her will, might properly be considered as persuasive in effect, the evidence being very much the same, and there being no claim that her mental condition had improved before the making of the will.
2. Although the proponent of a will in which he is named as executor is ordinarily entitled to recover his costs out of the estate whether successful or not, because it is his duty to present the will for probate, yet where he is adjudged to have procured the execution of the will by fraud and undue influence he should not recover costs but should be required to pay costs.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed.*

For the appellants there were briefs by *Goodrick & Goodrick,* attorneys for appellants *Adelbert Deleglise* and *Mamie (Cecilski) Deleglise,* and by *W. F. White,* guardian *ad litem* for appellants *Margaret, Irene,* and *Germane Deleglise,* and oral argument by *E. J. Goodrick* and *A. B. Goodrick.*

For the respondents *Morrissey* and *Leslie* there was a brief by *T. W. Hogan* and *Morson & McMahon;* for the respondent *Edmund Deleglise* there was a brief by *George W. Latta,* guardian *ad litem;* and the cause was argued orally by *Mr. Hogan, Mr. Latta,* and *Mr. H. F. Morson.*

WINSLOW, C. J. *Mary Deleglise* died at Antigo December 20, 1907, at the age of seventy-five years, having in form executed a will on the 15th day of the preceding August, which will was denied probate both in the county court and in the circuit court on the ground that she was incompetent to execute the same and that the execution thereof was procured by fraud and undue influence exerted by two of her children, *Adelbert Deleglise* and Mary Doersch. She left surviving her six adult children, viz., Mary Doersch, *Annie E. Morrissey, Sophia E. Leslie, Adelbert Deleglise,* Alexius Deleglise, and *Edmund Deleglise,* the last named being an imbecile residing at a hospital in Oshkosh. Her estate consisted principally of scattered parcels of real estate, partly in Antigo and partly outside the city, and was of the estimated value of nearly or quite $40,000. By her will, after devising $5,000 to her imbecile son *Edmund,* she divided the balance of the estate equally between four grandchildren and one adopted child, three of the grandchildren being the children of her son Alexius and one being the son of Mary Doersch. On the same day she deeded to Christina Doersch, daughter of Mary, land worth $3,200, to Alexius land worth $1,200, to St. Mary's church land worth $4,000, and to a foster child land worth $2,000. On July 9th, previous, she had given to *Adelbert* $3,000 in cash, and on November 1st

and 12th, following, she deeded to him parcels of land worth $8,000 and $4,000, respectively. She gave nothing to *Mrs. Morrissey* or *Mrs. Leslie,* the contestants here.

It appears that in 1905 *Mrs. Morrissey* and *Mrs. Leslie* petitioned the county court of Langlade county to appoint a guardian of their mother's person and estate on the ground that she was incompetent to manage her property, and one Edward Cleary was appointed such guardian by that court; but on appeal to the circuit court the order was reversed, and thereafter on appeal to this court the judgment of the circuit court was reversed, and the cause remanded with direction to affirm the judgment of the county court. *In re Deleglise,* 134 Wis. 41, 114 N. W. 130. This court then held that the judgment of the circuit court was against the great preponderance of the evidence. This judgment was rendered just one week prior to the death of the testatrix.

The evidence given upon the will contest was much the same as that given on the guardianship proceeding, and it seems entirely unnecessary to repeat here the long and unpleasant history of the quarrels in the family, the squandering of what might well have been a handsome fortune by incompetent and dishonest sons, and the indecent and sordid struggle between brothers and sisters to gain the advantage over each other in the good graces of their weak-minded mother; all this may be read at length in that case. It is true that there are some differences in the testimony in the two cases. In the present case the contestants were not competent to testify to personal transactions with the deceased (sec. 4069, Stats. 1898), so that some facts appearing in the testimony in the guardianship case do not appear in the present case. But even with these necessary omissions, and with considerable additional expert testimony on the part of the proponents, both the county and circuit courts were convinced of the incompetency of the deceased to make a will, as well as of the fact that *Adelbert* and Mrs. Doersch exerted undue influence over their mother.

It is really only a question of fact. We have carefully examined the record and have come to the deliberate conclusion, after such examination, that there was ample evidence, even after rejecting all testimony of doubtful admissibility, to fully sustain the findings of the trial courts. The findings of the circuit judge give evidence of very careful and painstaking consideration of the testimony. While the adjudication in the guardianship proceeding was in no sense *res adjudicata* in this case, it was doubtless considered by the trial court as quite persuasive in its effect, and rightly so, inasmuch as there was no claim that the mental condition of the deceased had improved between 1905 and August, 1907.

We have not been able to see that any good purpose would be subserved by an extended review of the facts. It must be sufficient to say, generally, that the evidence sustains the findings.

Adelbert is named as executor of the will and is the proponent thereof. Ordinarily the proponent of a will is entitled to recover his costs out of the estate whether he be successful or not, because it is his duty to present the will for probate. But clearly a proponent who has been adjudged guilty of securing the execution of a will by fraud and undue influence should not be entitled to recover his costs from any source, but rather should be required to pay costs.

By the Court.—Judgment affirmed, with costs to the contestants *Annie E. Morrissey* and *Sophia E. Leslie* against *Adelbert Deleglise* and Mary Doersch. No costs are to be taxed for printing the supplemental case. The guardians *ad litem* are each to recover statutory costs to be taxed and paid out of the estate.

BARNES, J., took no part.

On March 21, 1910, that part of the judgment awarding costs against Mary Doersch was vacated.

RAETHER, Respondent, vs. TOWN OF MENTOR, Appellant, and others, Respondents.

February 24—March 15, 1910.

Injury from defective sidewalk: Notice of defect: Negligence of town officers: Instructions to jury: Harmless errors.

1. In an action against a town for injuries caused by a loose plank in a sidewalk, evidence that the walk had been in that condition for ten or twelve days and that during that time the town officers were frequently upon the street in question, was sufficient to sustain a finding by the jury that by the exercise of ordinary care the town officers could have discovered and remedied the defect before the accident.
2. An instruction to the jury which correctly states the law in the abstract will not work a reversal merely because there was no evidence to which it was applicable.
3. An instruction that a lotowner was not responsible for any negligence or default, with reference to the sidewalk in question, of contractors erecting a building on his lot, was harmless in this case, even if not correct, there being no evidence that there was any necessity for the contractors to interfere with the walk at the point in question, or that they did interfere with it or create the defect, and the jury having found in effect that the defect existed before such contractors began work.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

This action was brought to recover damages for personal injury alleged to have been caused by the insufficiency and want of repair of a sidewalk in the unincorporated village of Humbird in the defendant town. The accident happened in front of and near the north side of a building that had just been constructed by the firm of Stallard & Zerbel. While such building was being constructed the sidewalk in front of the same had been removed, but had been replaced. Thereafter, and about ten days before the accident, the defendant *Babler* started to excavate for a building immediately north of that erected by *Stallard* and *Zerbel,* and to facilitate such

work he removed a portion of the sidewalk adjacent to where the excavation was being made. *Babler* himself did the work of excavation, but let the contract for the erection of his building. The excavation had been made and masons were at work on the foundation wall at the time of the accident. The plaintiff was proceeding in a southerly direction from a point north of the *Babler* excavation. After having passed around the same, in stepping onto the sidewalk she stepped on the end of a plank which was loose, and which suddenly flew up and threw her backward onto a pile of rock. After issue was joined, on motion of the defendant town the court, pursuant to sec. 1340*a*, Stats. (1898), ordered that the members of the firm of Stallard & Zerbel, as well as *Babler*, be made defendants in the action.

The jury found (1) that the plaintiff was injured; (2) that the highway at the time and place of the injury was insufficient and in want of repair; (3) that such insufficiency and want of repair existed for such a length of time that by the exercise of ordinary care the officers of the defendant town could have discovered the same and remedied the defect before plaintiff was injured; (4) that such insufficiency and want of repair was the proximate cause of the plaintiff's injuries; (5) that at the time the plaintiff was injured there were no barriers placed upon or across the sidewalk at or near the corners of the *Stallard* building sufficient to notify travelers in the exercise of ordinary care that they should not travel on such sidewalk in front of said building; (6) that plaintiff was not guilty of any want of ordinary care which contributed to produce her injuries; (7) that the insufficiency in the sidewalk was not caused or produced by the wrong, default, or negligence of the defendants *Stallard* and *Zerbel;* (8) that such insufficiency was not caused by the wrong, default, or negligence of *John Babler, Sr.;* (9) that the plaintiff suffered damages in the sum of $800. From a judgment entered on this verdict in favor of the plaintiff,

and also in favor of the defendants *Stallard, Zerbel,* and *Babler,* against the defendant town, this appeal is taken.

For the appellant there was a brief by *J. R. & C. R. Sturdevant,* and oral argument by *C. R. Sturdevant.*

For the respondent *Raether* there was a brief by *Homer C. Clark,* attorney, and *L. M. Sturdevant,* of counsel; for the other respondents there was a separate brief by *S. M. Marsh;* and the cause was argued orally by *Mr. Sturdevant.*

BARNES, J. The appellant contends (1) that the plaintiff was guilty of contributory negligence; (2) that the town was not guilty of negligence; (3) that the fifth question in the special verdict was double; (4) that certain questions requested by the defendant should have been submitted to the jury; and (5) that the court erred in instructing the jury.

The criticisms on the special verdict are not well founded and do not call for any discussion. The jury was warranted by the evidence in finding that the plaintiff was not guilty of contributory negligence. The third and fifth errors above referred to raise substantial questions that merit more lengthy consideration.

It is urged that the town was not liable because it did not have actual knowledge of the defect and because the proof failed to show that it existed for such a length of time that the town officers in the exercise of ordinary care should have discovered and remedied the same. There is no evidence in the case tending to show actual notice. There is but one item of evidence which tends to show constructive notice. That was given by the witness Allen, and is as follows:

"The plank upon which *Mrs. Raether* stepped was entirely loose and separate from the sidewalk at the time of the accident; it hadn't been nailed down. The sidewalk had been in that condition ever since the time prior to the commencement of the excavation of the bank cellar."

The excavation referred to was begun ten or twelve days before the accident occurred. The appellant argues that the evidence quoted does not mean that the plank had been loose since the excavation was begun, but that the general condition of the walk and its surroundings had been the same during the period named. While there is some ambiguity about the statement, a fair construction of it is that the plank was loose before the excavation was begun and continuously thereafter until the injury occurred, and the jury would be justified in so finding. The evidence showed that one of the town officers resided within a mile of the village, and was upon the street on which the sidewalk in question was constructed every day while the buildings were being erected, and that the other two officers were frequently there, as often as two or three times a week. It was for the jury to say whether, in the exercise of ordinary care, the defect in question should have been discovered and remedied before the injury occurred. This court cannot say as a matter of law that a loose plank in a sidewalk is a latent or hidden defect that could not be discovered by exercising ordinary care during the period named. The jury might very well have reached the conclusion that such a defect was readily discoverable by any person passing over the walk. That question, as well as the sufficiency of the length of time that the defect existed in order to establish negligence, was properly for the jury.

Error is alleged because the court instructed the jury that "when it is necessary in building to disturb the walk, the supervisors may reasonably permit the lotowner to take up the sidewalk or incumber it within a reasonable limit and with due caution for the safety of travelers." It is not claimed that this instruction is not a correct statement of the law in the abstract. It is criticised because there was no testimony in the case to which the instruction was applicable. We are unable to see how the appellant was prejudiced in

the slightest degree by this instruction or how it could possibly have affected the verdict of the jury. It would be a manifest perversion of justice to reverse judgments because of every harmless redundant statement made by a trial judge in his charge.

Error is also assigned because the court charged the jury that the lotowners were not responsible for any negligence or default on the part of the building contractors in reference to this sidewalk. The accuracy of this charge, as applied to the defendant *Babler,* is attacked on the ground that the removal of the sidewalk was not merely collateral to the work contracted to be done, but that the performance of the contract necessitated its removal, and therefore he could not escape responsibility for the negligence of his contractor under the doctrine of *Hundhausen v. Bond,* 36 Wis. 29, 40; *Hackett v. W. U. Tel. Co.* 80 Wis. 187, 193, 49 N. W. 822; and *Carlson v. Stocking,* 91 Wis. 432, 65 N. W. 58. There are several answers to this contention. In the first place the evidence does not show that there was any necessity for the contractor to remove or interfere with any more of the walk than had been removed by *Babler* himself when he was doing the work of excavating. In the next place there is nothing more than mere conjecture to support the view that *Babler's* contractor or his employees interfered with the walk or loosened the plank in question. Lastly, the jury found that the plank was loose a sufficient length of time so that the town should have discovered the defect and remedied it. There is not a scintilla of evidence to support this finding, except that heretofore quoted, and we must assume that the verdict is based thereon. That testimony showed that the plank was loose before the excavation was begun, and other evidence showed that the contractors did not begin work until the excavation was about completed. In view of the verdict of the jury this instruction became harmless, even if it were not correct, unless we assume that, had the

negligence of *Babler's* contractor been submitted to the jury, it would have made a finding thereon inconsistent with the one referred to. The jury acquitted the lotowners of negligence and held the town to be negligent. This result, no doubt, was reached because the jury was unable to say from the evidence that either of the lotowners was responsible for the plank being loose, but was able to say that it had been loose so long a time that the defendant town, in the exercise of ordinary care, should have discovered and remedied the defect. We find no substantial error in the record.

By the Court.—Judgment affirmed.

OVIG, Appellant, vs. MORRISON and another, Respondents.

February 24—March 15, 1910.

Adverse possession: Temporary absence: Extent of possession: Bad faith: Mistake of boundaries: Attempt to settle dispute: Presumptions: Divesting title of owner.

1. After establishment of adverse possession of land a temporary absence of the invader, such as leaving the dwelling house thereon without an occupant, while endeavoring to secure a tenant, or other temporary absence not evincing any intention of abandonment, there being no interruption of the possession by entry of the true owner, or other disseisin, does not suspend the running of the statute against such owner.
2. Actual possession of a part of a tract of land under color of title extends by construction to the calls of the paper basis for the entry.
3. In case of adverse possession of a tract of land under color of title, and actual adverse possession of contiguous land in connection therewith, possession extends by construction to the calls of the paper basis for the entry under the ten-year statute of limitations, while the twenty-year statute applies to the possession beyond such calls.
4. Neither good faith, bad faith, nor mistake of boundaries affects the character of possession requisite to title by adverse possession.

5. The sole test of adverse holding under the statutes on the subject of title by adverse possession, is whether the true owner is actually disseised for the statutory period.
6. Adverse holding is not interrupted by the hostile possessor endeavoring to settle the disputed right to the premises so as to avoid litigation, or the status of his claim affected.
7. An offer by a person claiming title to land by adverse possession, after lapse of the period of limitation, does not affect the rights of such person.
8. The rule of the Code is that unexplained, exclusive, continuous occupancy of land under a chain of title for the full period requisite to title by adverse possession, extinguishes the presumption of occupancy in subordination to the right of the true owner and creates a presumption of holding during such period with all the characteristics of adverse possession, subject to be rebutted by proof to the contrary, but conclusive in the absence of such proof.
9. Continuous disseisin of the true owner of a tract of land by another, or others, in continuity under color of title for a period of ten years, or without such color for a period of twenty years, creates a disability in such owner to recover the land by judicial remedies and so divests him of title and vests it in his adversary, though there was, to his knowledge, no legitimate basis whatever for his adversary's claim during the statutory period.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Action in ejectment. The defendants, among other things, pleaded title in defendant *Fannie H. Morrison* by adverse possession, under the twenty-year statute. There was proof that plaintiff had paper title to the south forty-six and one-fourth feet of the platted lot in question, but that her occupancy had only been up to the south side of a narrow strip of irregular width, averaging about four feet, sought to be recovered in this action. On the north side of that part of the lot occupied by plaintiff, for more than twenty years, there had existed a division fence and that part of the lot within the fence, including all the disputed strip, had been continuously occupied by the defendant *Fannie H. Morri-*

son and those under whom she claimed. More than twenty years prior to the commencement of the action said defendant's remote grantor owned the north part of the lot, claiming his south line to be the north line of the premises as occupied by plaintiff and her predecessors in title, and so claiming he located his dwelling house partly thereon, so that the north line as the plaintiff claims the same to be, passed through the south side of said house. Neither the person who built said house nor any one in the chain of title from him, intended to claim any further south than the true line, but the claim during the entire statutory period of twenty years has been that the fence aforesaid, recognized as a division fence, was on the line, or at least that no point of it was too far south. If such claim was not correct it was owing to a mistake of boundaries; claimant on the north side of the fence during the whole time treating that part immediately north of the fence as his property and actually and exclusively occupying the same. It was within an inclosure containing the dwelling house aforesaid which stood partly south of the north line of the disputed strip. The inclosure was used continuously for the full period of twenty years as appurtenant to such dwelling house. Whenever the dwelling house was occupied by the owner or a tenant the grounds were used on the north side of the fence in all respects as one having full title would use such premises. At no time during the twenty-year period did plaintiff or any one claiming under her use or occupy in any way any part of the strip of land sought to be recovered. When she constructed her sidewalk she built only to the point opposite the street end of the division fence.

The owner of the property north of the line fence in 1882 occupied it continuously till he lost the same to a purchaser under foreclosure proceedings. Thereafter the house and yard, including the strip in question, under the chain of title resting on the foreclosure proceedings, was kept for lease-

hold purposes. Generally the premises were occupied by a tenant. There were periods when there was no tenant; periods of absence from the premises of any person representing said defendant, but during none of such periods was there any invasion of the premises by plaintiff, or was there any indication, by any circumstance, of abandonment of any of the land north of the fence. It was treated by the person holding in defendant's chain of title as an owner might treat property kept for leasehold purposes.

On such evidence the court directed a verdict for defendant. Judgment was rendered thereon in defendant's favor and for costs.

A. C. Larson, for the appellant.

Arthur H. Shoemaker, for the respondents.

MARSHALL, J. Counsel for appellant claim, in the main, that the judgment should be reversed, because (1) possession in respondent *Morrison's* chain of title was not continuous during a twenty-year period creating ownership by adverse possession; that the occupancy was mostly by tenants and there were periods when the house on the premises was vacant; (2) respondent's possession, to the extent of the premises in dispute, beyond the calls of her paper title, was referable to mistake of boundaries, without intent to claim beyond the line described in her deed.

1. The first point may well be passed over briefly. Obviously, one's possession of land after adverse entry, by his tenant, is his possession, and if the tenancy is terminated, he still exercising acts of ownership over the premises, though leaving the building thereon vacant for an interval of time now and then, waiting for an opportunity to obtain another tenant, the seisin not being changed by hostile entry by an adverse claimant, the disseisin of any other commenced by the first entry is not interrupted. It is an elementary rule that where adverse possession of land has once been fully

established, occasional absences or intervals of there being no person residing on the premises, such circumstances not being of a character to evidence abandonment, and there being no actual interruption by re-entry of the person originally dispossessed, do not change the nature of the adverse possession. *Ill. S. Co. v. Bilot,* 109 Wis. 418, 428, 84 N. W. 855, 85 N. W. 402; Newell, Ejectment, § 49 (p. 737).

2. The idea that, where a person enters into actual possession as owner under a deed, and extends such possession beyond the calls thereof through mistake as to the true line, it is, as a matter of law, restricted to such line as to the character of the possession,—has no place in our statutes on the subject of adverse possession. Early observations out of harmony with that have been many times in recent years shown to be contrary to the written law. The extent of adverse possession under color of title, is measured by the true boundaries indicated in the evidence of ownership relied upon, but that does not interfere with actual occupancy beyond such true boundaries, in connection with that within them, being adverse to every other claimant and sufficient, if continued long enough, to make a good title. Actual occupancy of land to the exclusion of the true owner, regardless of whether in good faith or bad faith, whether by mistake of boundaries or with intent to claim the land with full knowledge that the claim is wrongful, satisfies the calls of the statute. Such adverse possession of part of a tract under color of title, with intent to claim the whole, in legal effect extends to the boundaries of the tract, and such actual possession beyond such boundaries, operates to the same effect upon the title of any other claimant, except that the twenty-year statute applies instead of the ten-year statute. *Ill. S. Co. v. Budzisz,* 106 Wis. 499, 511, 81 N. W. 1027, 82 N. W. 534; *Pitman v. Hill,* 117 Wis. 318, 94 N. W. 40; *Clithero v. Fenner,* 122 Wis. 356, 99 N. W. 1027; *Off v. Heinrichs,* 124 Wis. 440, 102 N. W. 904; *Ill. S. Co. v. Bilot,* 109 Wis.

418, 84 N. W. 855, 85 N. W. 402; *Bishop v. Bleyer,* 105 Wis. 330, 81 N. W. 413.

In *Bishop v. Bleyer, supra,* the court disposed of a similar contention to the one now made by saying, in effect, the adverse claimant, for the statutory period, continuously occupied the premises in dispute, as owner, to the exclusion of every other person, up to the line of the fence; that gave him the title by adverse possession under the twenty-year statute for any portion of the occupied premises not within the calls of his deed.

The necessity for the system which is written into our Code in order to avoid confusion and uncertainty on the subject of adverse possession, is significantly illustrated by the claim here made and another, which, until recent years, was often dignified as legitimate and is yet disturbing in the administration of justice. On the one hand it was claimed that adverse possession could not be grounded on possession as owner under mistake of boundaries, while on the other it was claimed that such possession must, to be effective, be characterized by good faith. The result was the theory that if a person, as owner, maintained exclusive, continuous occupancy by the location of his building or otherwise, partly within and partly without his true line, according to his paper title, for twenty years or any greater length of time, he was still in danger of being dispossessed of the latter portion because, if his occupancy was by mistake of boundaries, that was fatal to his claim of title, and if he intended to claim as owner regardless of the true boundary, or knowing that he was a trespasser, that was in bad faith and likewise fatal to his title. It is obvious that the only sensible, safe, and really equitable rule is to make the physical characteristics of possession, excluding all other persons, the sole test of adverse possession, and so it was written in the Code. It has been lost sight of at times. Experience has demonstrated, clearer and clearer, as time has progressed and the

importance of stability of titles has grown with increase in value of property, the wisdom of the Code makers in incorporating into their work the simple test of adverse possession indicated.

A claim is made that evidence by respondent *Fannie H. Morrison,* that in 1906, she, knowing that plaintiff was setting up some claim to the strip of land in dispute, endeavored to settle it to avoid litigation, was enough, of itself, to involve the character of her possession in such uncertainty that its true character was a jury question. There are two answers to that. First, the evidence shows, plainly, that there was no offer to purchase from appellant, conceding title in her, or under circumstances inconsistent with *Mrs. Morrison's* claim of title by adverse possession. Second, the premises had been in the actual occupancy of *Mrs. Morrison* and her predecessors in title continuously for some twenty-four years before the attempt to purchase appellant's claim. Her title was then unimpeachable. An attempt to obtain a paper title after having acquired title in fact could not, under any circumstances, affect her real status as owner.

Some general principles are discussed in the briefs of counsel for appellant, with numerous citations of authorities, to support the claim that the court erred in deciding from the evidence as matter of law, that the possession of respondent and her predecessors in title had been sufficient to satisfy all the requisites of title by adverse possession. It is enough to say, in respect thereto, that such principles are in harmony with the general rule of the Code, that upon unexplained exclusive, continuous occupancy of land under a chain of title, by one not the true owner, for the statutory period to make title by adverse possession, being shown, the presumption of seisin during any part of such period in the true owner, disappears and there arises in place thereof the presumption that, during all such period, the possession had all the requisites of an adverse holding, subject to be re-

butted by proof that it was in fact subordinate to the right of the true owner, but conclusive in the absence of such rebuttal.

Here there was, without question in our judgment, continuous occupancy by *Mrs. Morrison* and her predecessors in title up to the line fence, including all of the strip in dispute. That established, plainly, disseisin of any other claimant. It showed, without room for reasonable controversy, disseisin of all but the one actually seised, for the full statutory period, putting it beyond the jurisdiction of any court to interfere therewith in favor of any other claimant. Sec. 4207, Stats. (1898), provides:

"No action for the recovery of real property or the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years before the commencement of such action."

The foregoing in connection with sec. 4210 and sec. 4211, Stats. (1898), in a case of this sort; one where the actual exclusive occupancy as owner for the full statutory period is unquestionable, divests every person adversary to the one in possession of every element of right and vests the whole title in him, if he had none whatever before the completion of the statutory period.

It follows that the court properly directed the verdict against appellant and rendered judgment accordingly.

By the Court.—Judgment affirmed.

McDonald, Respondent, vs. Markesan Canning Company, Appellant.

February 25—March 15, 1910.

Equity: Election between inconsistent positions: Estoppel: Waiver: Corporations: Subscription for stock: Repudiation: Delay in asserting right: Assignment.

1. One who, having a choice between two inconsistent positions, exercises that choice, is finally concluded and confined to the rights and remedies appropriate to the position so chosen, and excluded from those consistent only with the repudiated one.
2. The rule above stated does not necessarily rest upon grounds of estoppel, and the election may have conclusive effect as a waiver of rights, independent of any prejudice to other persons which may result from a subsequent change of front.
3. Where a subscriber for stock of a proposed corporation had repudiated his contract and the other subscribers, acquiescing in such repudiation, had proceeded to form the corporation and after years of struggle had placed it upon a paying basis so that its stock was at a premium, the subscriber first mentioned had no right in equity to make payment and enforce issuance of the stock for which he had subscribed.
4. Although in such case it need not be shown that the granting of such right would result in prejudice to the other stockholders, such prejudice might well be found from the facts stated.
5. Where a right existing only in equity is not asserted, and no intimation of any purpose to assert it is given, until years after it arose, during which time there has been such a change in the situation that enforcement of the right will work substantial hardship, inconvenience, or embarrassment to the other party which would not have followed its prompt assertion, the claim founded on such right will be deemed stale and inequitable, whether sought to be enforced by the party originally entitled or by an assignee.

Appeal from a judgment of the circuit court for Green Lake county: Chester A. Fowler, Circuit Judge. *Reversed.*

On or shortly prior to the 4th of March, 1902, the Fisk-Kyle Company, described as canned goods brokers, a corpora-

tion of Chicago, Illinois, entered into a written agreement with the plaintiff and about thirty of his neighbors near Markesan, Wisconsin, whereby, whenever the writing should have been signed by subscribers to the extent of $11,500, the contract should become binding and should be to the effect that the Fisk-Kyle Company should procure a site at or near Markesan and should erect thereon and equip with machinery a canning factory. Such construction was to be according to specifications and subject to approval of a committee of the subscribers, all for $11,500, "which the said second parties hereby agree to pay." By another provision the subscribers each agreed to pay in cash twenty-five per cent. of the amount when buildings were inclosed and balance when buildings were completed, the payments to be made to the Fisk-Kyle Company. It further provided that the contract should be closed by obtaining subscriptions amounting to $11,500 or more, whereupon the subscribers agreed to become incorporated under the laws of Wisconsin with $100 shares of capital stock, and that each subscriber thereto should receive a fully-paid nonassessable certificate of the stock to the amount of his paid-up subscription thereon. In case the subscription exceeded $11,500, all surplus collected by Fisk-Kyle Company was to be turned into the treasury of such corporation. The contract was subscribed to an amount slightly in excess of $11,500, to wit, $12,700. Thereupon the subscribers met and, as a meeting of subscribers, selected a president and secretary and also a building committee, or so-called board of directors. Plaintiff was chosen a member of said so-called board and also secretary. The building progressed, plaintiff was dissatisfied with the work and expressed his dissatisfaction to the directors, who apparently ignored or overruled the same, whereupon he declared in the most emphatic and unambiguous terms his determination to withdraw from the whole enterprise. A discussion continued for some time, but that determination and declaration

took place at a time after the articles of association had been signed by certain of the subscribers, including the plaintiff, and before they had been filed with the secretary of state. Thenceforward, after that declaration, plaintiff resigned as director and secretary. His resignation was not at once formally accepted on the minutes, but he, in pursuance of his declaration, withdrew entirely from all further connection. The corporation was finally organized on a stock basis of $11,500. Certain subscriptions were allowed to be withdrawn or diminished until the total of subscriptions was reduced to $11,800. All of the remaining subscribers, except one Walker, who took the same position as plaintiff did, upon completion of the building paid to Fisk-Kyle Company their subscriptions and received a receipt therefor, which, on presentation to the corporate officers, resulted in the issue of certificates of stock. Fisk-Kyle Company, in January, 1903, sued plaintiff and one Walker for the $500 which each had subscribed. In the suit against plaintiff he interposed as defense Fisk-Kyle Company's noncompliance with sec. 1770*b*, Stats. (1898), and at the close of the evidence in that case, on motion, a judgment of nonsuit was entered in June, 1903, apparently but not clearly on the ground of such invalidity of the contract. Fisk-Kyle Company waited until more than two years after this judgment and then sought permission to settle bill of exceptions, which, because the time for appeal had expired, was denied by the court. This was in 1905. They appeared thereafter to have had some correspondence with the attorney for plaintiff and said Walker in the way of an attempt to induce these subscribers to change their minds and pay their subscriptions. After all the paying subscribers had received their stock it was found to amount to $10,800, so that there remained unissued as against the two $500 subscriptions of plaintiff and Walker only seven shares of stock. This continued to remain unissued until December 27, 1907, when the president and secretary executed two

certificates of stock, one for five shares and the other for two to the defendant company itself, which, however, were never mechanically removed from the stock book where they still remain. After the building was completed the defendant engaged in the business of canning vegetables; met with misfortune, ran heavily in debt, lost money, so that its shares of stock sold as low as fifty cents on the dollar. Finally the stockholders came to its relief financially, each becoming personally liable as indorser upon its notes to the amount of seventy-five per cent. of his stockholding; and later considerable sums were supplied to the company by the loaning of credit by the creditors. In addition an increase of capital stock to the extent of $4,200 was made in February, 1904, which was mainly, if not entirely, subscribed by the existing stockholders and paid for at par. Following this increase of capital stock and a change in the character of the business the concern became profitable and in 1905 it was able to pay all its debts, including the notes which had been guaranteed by the several stockholders, and was doing a thriving business.

In 1906 plaintiff seems to have experienced a change of heart on learning that the stock had become worth a considerable premium, and an attempt was made to get the remaining seven shares issued jointly to him and Walker, although they had not at that time either of them paid their subscriptions. But on October 1, 1907, when, as appears, the stock had attained a value more than twice its par, plaintiff went to Chicago and gave his note to the Fisk-Kyle Company for $500 and surrendered his judgment for costs in the previous mentioned suit which he had found it impossible to collect, and obtained a certificate of such payment of $500. On October 10, 1907, he presented the evidence of such payment to the defendant *Markesan Canning Company* and demanded the issue of a certificate for his five shares of stock, and repeated on December 23d a further and more formal notification of the payment and demand for the certificate of stock.

Plaintiff freely conceded his categorical and intentional repudiation of the contract in 1902, his persistency in such election until 1906 or later, and that his change of position at that time was due to information that the stock had in the course of the four years become worth much more than par.

The court held substantially that plaintiff had so completely repudiated the contract and exercised his election to that end that the other parties to the contract could have stood upon such election, but that by reason of his payment to Fisk-Kyle Company, accepted by them and consequent subrogation to their right, he might enforce delivery of the stock, and entered judgment therefor, commanding the issue of a certificate to the plaintiff for five shares of stock, declared that he had no right to participate in the dividend of January, 1907, but might in all subsequent division of assets. From such judgment the defendant appeals.

For the appellant there were briefs by *Barbers & Beglinger* and *J. L. Millard,* and oral argument by *Mr. Charles Barber* and *Mr. Millard.*

John J. Wood, Jr., attorney, and *B. R. Goggins,* of counsel, for the respondent.

Dodge, J. The contract here under consideration, which constitutes the basis of all rights urged, is tripartite, so that each party assumes duties to each of the others and acquires rights against each. While primarily it is a contract between Fisk-Kyle Company and the association of men, afterwards to constitute the *Markesan Canning Company,* to the effect that the former should build the factory for $11,500 and the latter accept it and issue stock to those individual subscribers upon payment by them to the former, it is also a contract between each of the subscribers and Fisk-Kyle Company to the effect that the subscriber would pay, in consideration of the construction of the building, the sum set opposite his name at a time specified. Further than this, however, it is a

contract between each subscriber and the association, when merged in the corporation, that he, the subscriber, would pay the sum specified, would participate in the incorporation, and would accept stock therein at par value for his contribution; and on the other hand that such corporation, upon such payment, would accept such individual subscriber as a stockholder and accord him his lawful rights as such. The most obvious question presented by the pleadings and evidence is whether plaintiff is entitled to the aid of a court of equity to enforce delivery to him of the stock in accordance with and by virtue of his original contract with the defendant.

The principle is very firmly established in the jurisprudence of Wisconsin that one "having a choice between two inconsistent positions, who exercises that choice, is finally concluded and confined to the rights and remedies appropriate to the position so chosen and excluded from those consistent only with the repudiated one." *Smeesters v. Schroeder,* 123 Wis. 116, 101 N. W. 363; *Pabst B. Co. v. Milwaukee,* 126 Wis. 110, 105 N. W. 563; *Smith v. Burns B. & Mfg. Co.* 132 Wis. 177, 186, 111 N. W. 1123; *Fox v. Wilkinson,* 133 Wis. 337, 113 N. W. 669; *Pfeiffer v. Marshall,* 136 Wis. 51, 59, 116 N. W. 871; *Voss v. Northwestern Nat. L. Ins. Co.* 137 Wis. 492, 118 N. W. 212. This upon the ground that by arrogating to himself the rights and advantages resulting from the first position he necessarily intends to give up and waive any inconsistent rights which would follow the alternative choice. It does not necessarily rest upon grounds of estoppel, though those may be persuasive.

In the instant case it is undisputed, indeed is established by the frank and definite testimony of the plaintiff himself, that in 1902, before the completed organization of the proposed corporation, he, on what he claimed was legal justification, fully determined upon the choice to repudiate the contract, to refuse to pay the sum subscribed by him, and to refrain from participating in the proposed corporation; that

this mental determination was left in no uncertainty or doubt, but was then declared in the most unambiguous terms to his associates, who took him at his word without protest, organized their corporation without further demand upon him to co-operate, and for four or five years he and they proceeded upon the theory of the entire abandonment of any contract as between them requiring him to become a member or giving him rights as such, he retaining his money and freedom from the obligation and risks of a member. The above-cited authorities establish the final and conclusive effect of such an election and consequent waiver of any rights as a stockholder, wholly independent of any prejudice to the other party or parties to the contract which might result from a change of front, and therefore it is not material to inquire whether any such prejudice had been suffered, though in the present case it is not difficult to discover from undisputed evidence that men who have borne the burden of an unprosperous and struggling corporation through years and bolstered it with their private means and personal credit until after many years of such struggle have made it profitable and accumulated large surplus, will be prejudiced if one who has, contrary to his contract, refused to bear his share of such risk and burden is permitted to come in and assert a proportionate interest in its success. One who refuses to incur the risk cannot equitably demand a share in the success of an enterprise. Clearly plaintiff has neither legal right nor equity to now, after speculation has been transformed into certainty of profit, assert a right against the defendant that it perform the contract on its part which he so conclusively repudiated years before.

It is contended, however, that by payment to Fisk-Kyle Company, voluntarily accepted by it, plaintiff became equitable assignee of all rights of that company existing by virtue of its contract relations with the defendant, and can enforce such rights, although he may have waived all the rights which

the contract, as between him and defendant, gave him. If this be conceded, his rights cannot exceed those of Fisk-Kyle Company existent at the time of such payment, October 1, 1907. What, then, were those rights? Clearly no legal right to payment of either stock or money from defendant was conferred by the contract. That provided merely that Fisk-Kyle Company should build the specified building for $11,500 and should look for its pay to the individuals who subscribed. Nevertheless, since Fisk-Kyle Company were to build the factory and transfer it to the *Markesan Company* in anticipation that each subscriber would pay as he had agreed, the subsequent failure of any such subscriber to pay created a situation where the defendant had received something of value from Fisk-Kyle Company for which the latter had not been paid and for which the former had parted with nothing of value. It is urged that in such a situation there arose some equity that the defendant should respond to the Fisk-Kyle Company for such benefit derived by it to the loss of Fisk-Kyle Company. This contention rests upon a very broad equity, but in general it may be conceded, *arguendo*. It is unnecessary to decide whether that equity could exceed payment of either the money not received on the subscription or the shares of stock to the same amount at the election of defendant, as we have concluded that Fisk-Kyle Company had lost the right to demand either, for reasons now to be stated. When a court of equity is invoked to grant its peculiar remedies or to enforce rights so far variant from and in excess of any existing legal right, the plaintiff must approach it with diligence and freedom from misleading and embarrassing conduct. Especially will he not be permitted, after long delay and change in situation, to demand such equitable right if its then enforcement will work any substantial measure of hardship, inconvenience, or embarrassment to the other party such as would not have followed the prompt assertion of the right contended for.

Both diligence and clean hands are essential. *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532; *Rogers v. Van Nortwick,* 87 Wis. 414, 58 N. W. 757; *Docter v. Furch,* 91 Wis. 464, 65 N. W. 161; *Cross v. Bowker,* 102 Wis. 497, 78 N. W. 564; *McCann v. Welch,* 106 Wis. 142, 81 N. W. 996; *Kruse v. Koelzer,* 124 Wis. 536, 541, 102 N. W. 1072; *Likens v. Likens,* 136 Wis. 321, 117 N. W. 799; *Larscheid v. Kittell, ante,* p. 172, 125 N. W. 442, and cases there collected; *Burkle v. Levy,* 70 Cal. 250, 11 Pac. 643; *Hammond v. Wallace,* 85 Cal. 522, 24 Pac. 837; *Plymouth v. Russell Mills,* 7 Allen, 438; *Sagadahoc L. Co. v. Ewing,* 65 Fed. 702. In the present case Fisk-Kyle Company were definitely informed prior to January, 1903, of plaintiff's refusal to pay, confirmed by a judgment, albeit only of nonsuit, in June of that year. Upon such refusal it had the duty and opportunity before it either to look to the plaintiff for payment by taking legal proceedings to enforce his contractual liability or, perhaps, yielding to his refusal, to then assert its equity against the defendant. The existence of such a claim upon the defendant's treasury either for capital stock or for money was a material consideration, especially during the two or three years of its losing business and financial embarrassment. Much of its capital stock was taken during that period, in ignorance of any such claim. We cannot say that the existence of such a cloud might not have spared the corporation and its members and officers the years of struggle, anxiety, and financial risk through which they passed, and it is no answer now to point out the fact that those labors and risks have ultimately resulted in profit. If in the years 1904 or 1905 those efforts had proved unsuccessful, the defendant and its members might well have felt outraged, especially if, as was by no means impossible, such failure had been caused in whole or in part by the assertion or discovery of the hitherto unknown demand of Fisk-Kyle Company. Obviously if its conduct had been such that in 1904 or 1905 it was de-

barred from asserting such an equity, no right to do so could thereafter be revived by the successful outcome of the defendant's business. During those years Fisk-Kyle Company gave no intimation of a purpose to assert any such demand, but allowed the defendant to organize and adjust its business under the difficulties and trials already suggested upon the basis that no such claim was to be made. In this situation, we are satisfied, under the authorities above cited, that in October, 1907, Fisk-Kyle Company could not have been recognized by a court of conscience as a suitor either diligent or clean-handed; that before that time its conduct had been such as to make any claim in its favor against the defendant stale and inequitable, and that such court must have refused it the exertion of its extraordinary jurisdiction to arouse and create the very general equity now asserted. Of course any claim by the plaintiff in the right of Fisk-Kyle Company is at least equally within the ban of this rule, and he cannot in good conscience be heard to assert it.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

LOESCHER, Plaintiff in error, vs. THE STATE, Defendant in error.

February 25—March 15, 1910.

Rape: Resistance: Threats: Examination of witnesses: Leading questions: Discretion.

1. To constitute rape the act must be committed by force and against the will of the female; but where she is rendered insensible through fright, or ceases resistance under fear of death or great bodily harm, the consummated act is rape.
2. A conviction of rape is sustained in this case upon evidence which is *held* sufficient to warrant the jury in finding that the

prosecutrix ceased to resist because her will was overcome by threats of great bodily harm. WINSLOW, C. J., and MARSHALL, J., dissent.

3. The allowance of leading questions is a matter largely in the discretion of the trial court. Such questions being necessary in this case in order to get at the facts, their allowance was not an abuse of discretion.

ERROR to review a judgment of the circuit court for Kenosha county: A. C. BRAZEE, Judge. *Affirmed.*

Calvin Stewart, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *Robert Verne Baker,* district attorney, and oral argument by *Mr. Baker.*

KERWIN, J. The plaintiff in error, hereinafter called the defendant, was convicted of the crime of rape upon a seventeen-year-old girl, sentenced to imprisonment for the term of ten years, and brings error. The main question before us for consideration is whether the evidence is sufficient to support the verdict of guilty. The contention of counsel for defendant is that the state failed to prove nonconsent or loss of volition and submission by reason of loss of volition.

The evidence produced tends to show that on the day in question, February 13, 1909, shortly after 7 o'clock in the evening, the prosecutrix left her home in the city of Kenosha, Wisconsin, to go to a party at the home of one Becker. She called at a house on the way for a girl friend, whom she did not find, and proceeded on her way to the party, stopping at a store to get a box of candy, where she remained about ten minutes, and then continued on her journey. She met defendant, whom she did not know. After she had walked a block she heard defendant running after her, and when he came up to her he took hold of her and spoke to her. She did not answer. He walked about two doors with her until they were about in front of the Becker house where she was going. She screamed and he put his hand over her mouth.

She bit his hand. He then grabbed her by the throat, drew her through an alley near the Becker house, until they came to a washline, which she took hold of and to which she clung. Defendant told her to let go the washline or he would run his knife into her side, and, as he said this, pressed something against her side. Defendant then drew prosecutrix across two lots, against her will, to a chicken coop, and threw her upon the ground, where water had collected from melting snow. She was frightened; tried to get up. He grabbed her by the throat and tried to strangle her. She got up and tried to get away. He grabbed her again and threw her down, and sat or kneeled upon her legs; put his coat under her head, took off her clothes, and, by renewal of the threats that he would run a knife into her, made her loosen her elastics, then pulled down her drawers, and had sexual intercourse with her against her will. She was paralyzed with fear. Just before the sexual intercourse, without stating in detail the vulgar language used, defendant said in effect that he did not want to commit murder, but did want to accomplish his purpose. After the act he said he might get ten years for this, but that he would take the train for Chicago that night and be in New York the next day. After the act was committed prosecutrix helped defendant, at his request, to put on his coat, and said she would say nothing about it, because she wanted to get away from defendant and through fear of refusing to comply with his request to that effect. She immediately after the act, and as soon as she could get away from defendant, hastened to the Becker house, pushed in the door, was in a state of great excitement, crying and sobbing, her clothes wet from the water where she had been thrown down, her hair down and disarranged, her face and eyes very red, appeared greatly exhausted, and said she had been assaulted by a man and told what had happened. She lay on the couch in the Becker house for a long time with her hands over her face, and appeared to be in great distress.

When defendant came home at about 8 o'clock in the evening he was intoxicated. Defendant was a stranger to prosecutrix, she not having seen him to her knowledge before the time of the assault. Defendant was thirty years old, and prior to the assault upon prosecutrix had been twice convicted of burglary.

We shall not attempt to detail the evidence at any great length. The foregoing, however, gives a fair idea of the salient points proved and upon which the case turns. Defendant admitted having sexual intercourse with the prosecutrix, but denied the force and threats. In other respects the story of the prosecutrix was substantially undisputed by the defendant. While there is considerable evidence to the effect that the defendant exercised force from the time he first assaulted the prosecutrix until he accomplished his purpose, it is at least very doubtful whether the evidence of force was sufficient to support the verdict in the absence of evidence of the threats and fear induced by such threats. In order to constitute the crime of rape the evidence must show that the act was committed by force and against the will of the female; but where the female is rendered insensible through fright, or ceases resistance under fear of death or great bodily harm, the consummated act is rape. 1 Wharton, Crim. Law (10th ed.) § 557; *Sharp v. State,* 15 Tex. App. 171; *State v. Ruth,* 21 Kan. 583; 2 Bishop, Crim. Law, §§ 1120, 1122; *Brown v. State,* 127 Wis. 193, 199, 106 N. W. 536; *State v. Reid,* 39 Minn. 277, 39 N. W. 796; *State v. Cunningham,* 100 Mo. 382, 12 S. W. 376; *Wright v. State,* 4 Humph. (Tenn.) 194; *State v. Shields,* 45 Conn. 256; *Rahke v. State,* 168 Ind. 615, 81 N. E. 584. As said in 2 Bishop, Crim. Law, § 1125:

"A consent from fear of personal violence is void; and though a man lays no hands on a woman, yet if by an array of physical force he so overpowers her that she dares not resist, his carnal intercourse with her is rape."

This court has often recognized the rule that where the will of the woman is overcome by threats of great personal injury there is no consent. *Brown v. State,* 127 Wis. 193, 199, 106 N. W. 536; *Croghan v. State,* 22 Wis. 444; *Bohlmann v. State,* 98 Wis. 617, 621, 74 N. W. 343; *Whittaker v. State,* 50 Wis. 518, 7 N. W. 431. In the last-cited case the conviction was reversed upon error in the charge, and in considering the subject of consent the court said:

"This is not a case where the prosecutrix was overcome by threats of personal violence, and paralyzed and rendered helpless and passive by fear, so that her volition could not be exercised either for or against the act of sexual connection."

And in *Bohlmann v. State, supra,* the court said:

"The power of resistance need not necessarily be overcome by superior physical force. If overcome by fraud or fear of serious personal injury, or if physical resistance becomes so useless as to warrant it ceasing upon that ground, there being no consent or submission in the sense of mental operation, the essential of the accomplishment of the act by force and against the will of the outraged party is fully satisfied. The law as thus laid down is too well understood and has been too frequently applied in this court to require discussion or call for any citation of authority."

Counsel for defendant relies upon *Brown v. State,* 127 Wis. 193, 106 N. W. 536, and *State v. Cowing,* 99 Minn. 123, 108 N. W. 851, 9 Am. & Eng. Ann. Cases, 566. But the legal doctrine laid down in these cases is not out of harmony with what has been heretofore said in this opinion. In the *Brown Case* it did not appear that the female was overcome by fear or became paralyzed by threats and intimidation, and the evidence on the question of resistance was weak and insufficient to carry the case to the jury. The case was very different in its facts from the one now before us. The same may be said of other cases in this court in which convictions have been set aside for insufficiency of evidence, notably *Bohlmann v. State, supra,* and *O'Boyle v. State,* 100

Wis. 296, 75 N. W. 989, 991, where the relation of the parties with each other, and the character of the evidence, were such as to render evidence of resistance incredible. In the *O'Boyle Case* there was no corroboration, and the court said (p. 300):

"Where the testimony of the prosecuting witness bears upon its face evidence of its unreliability, to sustain a conviction there should be corroboration by other evidence as to the principal facts relied on to constitute the crime."

In *State v. Cowing, supra,* the court reviewed the cases at great length on the question of the resistance necessary to be proved in order to constitute the crime of rape, and found that the evidence was insufficient, and, further, that there was no evidence of threats or intimidation on the part of the defendant or any intent on his part to use any means necessary to accomplish his purpose, nor any reasonable grounds for apprehension of bodily harm.

The inferences to be drawn from the evidence in the case before us are strongly against the defendant. It is unlike cases in this and other courts where the relations of the parties were such as to render a claim of nonresistance at least in some degree plausible or perhaps credible. The defendant and prosecutrix in this case were strangers. They had never associated together. That prosecutrix should consent to the sexual intercourse under the circumstances detailed in the evidence seems most improbable and unnatural. Besides, there is much corroborative evidence here that prosecutrix did not consent. True, there is evidence which would indicate that she did not resist to the extent of her ability, and if it were not for the evidence of threats of bodily harm it would be difficult, if not impossible, to sustain the conviction. But the attack upon this young girl by defendant was a brutal one and well calculated to terrify her and paralyze her with fright. We have referred to the substance of the evidence regarding the threats and need not repeat it in detail. Seiz-

ing the prosecutrix by the throat, attempting to strangle her, threatening to put his knife into her side if she resisted, accompanied by a movement indicating a purpose to do so, renewing these threats just before the act was consummated, and stating that he did not want to commit murder but did want to accomplish his purpose, in connection with other facts and circumstances in the case, were sufficient to warrant the jury in finding that the prosecutrix was prevented from further resisting through fright occasioned by the threats and that she never consented to the intercourse. As we have seen, failure to resist to the utmost of the female's ability through fear of death or great bodily harm is no defense in a prosecution for rape. No complaint is made here that the jury was not properly instructed upon the law, and therefore we must assume, in the absence of anything appearing in the record to the contrary, that the jury found that the will of the prosecutrix was so overcome by threats of great bodily harm as to deter her from further resistance.

In 3 Russell on Crimes (6th ed.) p. 225, it is said: "The offense of rape may be committed, though the woman at last yielded to the violence, if such her consent was forced by fear of death or by duress." In *Wright v. State,* 4 Humph. (Tenn.) 194, it was held that consent through fear was no defense to prosecution for rape. In *State v. Ruth,* 21 Kan. 583, 589, it was ruled:

"That if a person by threats, or by placing a female in fear of death, violence, or bodily harm, induces her to submit to his desires, and while under this influence ravishes her, this is as much a forcible ravishing as if a person, by reason of his superior strength, would hold a woman and forcibly ravish her."

To the same effect is *McQuirk v. State,* 84 Ala. 435, 4 South. 775, 5 Am. St. Rep. 381; *State v. Cunningham,* 100 Mo. 382, 12 S. W. 376; *State v. Shields,* 45 Conn. 256; *Rahke v. State,* 168 Ind. 615, 81 N. E. 584; *Bailey v.*

Comm. 82 Va. 107; *Ransbottom v. State,* 144 Ind. 250, 43 N. E. 218; *Sharp v. State,* 15 Tex. App. 171. In the case last cited there was practically no resistance. It appearing, however, that the female submitted through fear, a conviction was sustained.

The court below and the jury saw defendant in this case as well as prosecutrix, heard their evidence, and were in a much better position to judge of the weight and credibility of the evidence than this court. The court is of opinion that the question of defendant's guilt was for the jury. *Williams v. State,* 61 Wis. 281, 21 N. W. 56; *Schuster v. State,* 80 Wis. 107, 49 N. W. 30.

The point is made by counsel for the defendant that the court erred in its rulings on evidence, and that error was also committed by reason of remarks by the trial judge in the presence of the jury. The principal complaint of counsel is that the questions of the prosecuting attorney were leading. It is apparent, however, from the record that it was necessary in order to get at the facts to permit leading questions, and the trial court obviously recognized that. Whether or not leading questions should be allowed rests largely in the discretion of the trial court. *Barton v. Kane,* 17 Wis. 37, 42; *Porath v. State,* 90 Wis. 527, 537, 63 N. W. 1061; *Bannen v. State,* 115 Wis. 317, 91 N. W. 107, 965; *Brown v. State,* 127 Wis. 193, 206, 106 N. W. 536.

The court is of the opinion that no prejudicial error was committed on the trial below, and that the judgment should be affirmed.

By the Court.—Judgment is affirmed.

WINSLOW, C. J. (*dissenting*). I am unable to bring my mind to the conclusion that the evidence justifies a conviction for rape. In my judgment the admissions of the complaining witness as to her failure to resist as well as to her active assistance in the very act make a legal conviction for rape

impossible within the rules laid down in *O'Boyle v. State,* 100 Wis. 296, 75 N. W. 989; *Brown v. State,* 127 Wis. 193, 106 N. W. 536. To my mind the statement that she was "paralyzed with fear" is absolutely disproven by her own admissions as to what she did and what she omitted to do. It seems to me that hereafter all that will be necessary to turn fornication into rape will be for the complaining witness to testify that she was paralyzed with fear, no matter how incredible the physical facts may make that statement appear.

MARSHALL, J. (*dissenting*). I concur in the emphatic dissent by the chief justice from the decision in this case.

In explanation of my position it must be said that I do not understand the record as the court seems to have. It was not thought necessary in the court's opinion to state evidence in detail, only generalities, in the main, from conclusions of the prosecutrix, which this court has frequently declared are not entitled to any weight. *Bohlmann v. State,* 98 Wis. 617, 74 N. W. 343; *O'Boyle v. State,* 100 Wis. 296, 75 N. W. 989; *Devoy v. State,* 122 Wis. 148, 99 N. W. 455; *Brown v. State,* 127 Wis. 193, 106 N. W. 536. In the last case cited the court, as to the requisite character of evidence to establish the vital facts of resistance and nonconsent, said:

"It is settled in this state that no mere general statements of the prosecutrix, involving her conclusions, that she did her utmost and the like, will suffice to establish this essential fact, but she must relate the very acts done in order that the jury and the court may judge whether they were omitted."

Here the girl testified, over and over again, that she was "terrorized." She endeavored to excuse herself for failing to do any of the acts which a woman would be naturally expected to do under the circumstances to prevent her ravishment, upon the pretext that she was "terrorized." When the accused was walking her down to the chicken coop, passing by the doors and windows of several occupied houses, she

made no outcry or resistance worthy the name upon the pretext that she was "terrorized." She was a fully and rather overdeveloped woman, physically and otherwise. She was seventeen years old and weighed about 125 pounds. She was a working girl and would, naturally, under inspiration of supreme aversion to enforced ravishment, have been quite a match in strength for the accused. From first to last she was not injured physically in the slightest degree, nor were her clothes torn, nor was any violence used in respect to them. She was not sufficiently outraged in mind but that she had more care for saving her glasses than of protecting her virtue. She did not lose the glasses or her hat, nor was either broken or injured. He was not injured in any way. Not a mark was left upon the body or clothing of either, indicating attack or resistance. From just such circumstances as those, on evidence quite as strong as any in this case, the court condemned the verdict in *Brown v. State, supra,* and held that there was only proof of fornication with some degree of reluctance, that, however, not continuing to the end. A like situation is, to my mind, plainly portrayed here. The accused had no weapon. He made no move indicating a purpose to obtain one or use one. All the evidence of the prosecutrix as to his saying that he threatened to put a knife into, and she felt some hard substance against, her side when she was walking down to the chicken coop seems to be almost, if not quite, nonsensical. At that very time according to her own story, he had both arms around her and had been walking along with her in that attitude substantially from the instant that he fell into her company. After arrival at the chicken coop she said she could not recollect that she did anything. She said he threw her down and she got up and was free from him, he being flat on his back. There seems to be no reason at all why she did not then flee, if she really wished to escape. Her excuse for not doing so appears to me almost silly. She seems really to have given the accused, by coyly

lingering within his reach, opportunity to take hold of her and pull her down with him again. Then, according to her own story, she did not kick or bite or strike or do any of the things which it was suggested in *Brown v. State* and other cases in this court are natural concomitants of genuine resistance to ravishment. He removed in part, the clothing which was in his way. She informed him, when he met with some difficulty, how to overcome it, and completed the disrobement of her person herself. Her mental attitude did not change from that time on to the close of the encounter other than to more plainly indicate consent, if not even desire. Several times she testified that she was "terrorized," but that, obviously, was not entitled to any weight. She testified that though physically unimpaired and in the fulness of her strength, for aught of its having been exhausted by physical resistance, from the time actual contact commenced till the affair was over, she did not do anything. She would not even testify but that her limbs were disposed favorably. The condition is well indicated by this testimony: "Did you kiss him then? *A.* I don't know. *Q.* You don't remember? *A.* No. If I did I was unconscious of it." What does that indicate if not consent? After the encounter was over and she was free from the accused, did she flee? No. She, as the evidence would indicate, deliberately rearranged her clothing and assisted him at his request to put on his overcoat. Circumstances again, which in *Brown v. State, supra,* were said to repel the idea of rape. Then she walked along towards her destination, accompanied by the accused and exchanged promises with him not to tell of what had occurred. True, she said she did so because she was afraid. Again indulging in her preposterous conclusions, which though repelled by the evidence, seem to have been taken by the jury to outweigh it. When she arrived at her destination there is little, if anything, in what occurred, so far as her testimony goes, indicating that she had just been forcibly rav-

ished. She went into the house and told a Mrs. Becker that she had been "held up," explaining what she meant, and then, according to her own story, lay down on the couch and waited for her clothes to dry before going home. She did not testify to anything indicating that she was "terrorized." She did not even say she cried before or after arriving at her destination or spoke in any way in the manner of that supreme indignation which a woman would naturally evince immediately upon having been dealt with as charged.

All that repels the idea of rape. True, the woman who met the girl when she arrived at her destination, testified that she cried, and that the witness spent her time endeavoring to soothe her till after she left the house to go home. That story, in view of the girl's, seems quite as unworthy of belief, as is the latter's that she was "terrorized," while she was assisting the accused to conveniently get to her person, and assisting him to put on his overcoat after the affair was over and while they were walking away together and exchanging promises not to tell. True, the statement in the court's opinion would indicate some basis for the verdict, but the difficulty is, general conclusions of the prosecutrix are dignified as evidence, contrary to, as said in the *Brown Case,* "the settled law of this state" in this class of cases. Take out of the case such general conclusions and look at just what the witness said occurred and there appears, as the chief justice indicated, a pretty clear case of fornication without sufficient resistance at any time to indicate that any power other than the female's own moral weakness under the influence of suggestion persisted in by the accused, was necessary to accomplish her consent.

The offense of rape is a terrible crime. There is about as much difference between it and that of fornication as there is between assault and battery and murder. Indignation toward low male characters who take advantage of the moral weakness of such of the opposite sex as they may choose as prob-

able submitting victims, must not result in breaking down, or making at all uncertain, the boundary line between fornication and rape. No court in the land has made that boundary more distinct than this, repudiating the loose expressions made by some courts and text-writers and in one or two early decisions here. *Whittaker v. State,* 50 Wis. 518, 7 N. W. 431. There the court emphatically repudiated the theory that there can be consent under any circumstance and the crime be rape, and declared that consent, regardless of circumstances, does away with the element of "against her will" and renders that fornication which otherwise might be rape. It seems that the marked distinction, pointed out in the *Whittaker Case,* between submission through inability to longer resist because of physical exhaustion or fear, while still continuing to mentally resist, may not be appreciated in the future. The court condemned using the word "consent" so as to indicate that it can ever exist in a case of rape, explaining that while there can be submission without consent there cannot be consent without submission. The use of authorities now from jurisdictions where that distinction has not been clearly recognized, may break the force of the studied attempt to not only recognize it here but to eliminate from previous decisions anything out of harmony therewith. "Any consent of the woman," said the court, "however reluctant, is fatal to a conviction. There must be the utmost reluctance and resistance." Again, "if the carnal knowledge was with the voluntary consent of the woman no matter how tardily given, or how much force had theretofore been employed, it is no rape." The court further said, in effect, that mere technical nonconsent is not sufficient to satisfy the essentials of rape. There must be actual nonconsent of mind and body. There must be actual resistance by every means within the power of the female, under the circumstances, not at first only, but to the very end, or the case, at the worst, is only fornication aggravated by circumstances to

be taken into consideration in fixing punishment; that the crime of rape cannot be committed with the consent of the woman no matter how obtained, though there may be submission in the sense of not resisting through physical and mental disability to resist, and the crime be rape.

The dominant difficulty here is that there is hardly a circumstance as to the conduct of the two participants in the affair during or after the encounter to indicate a struggle of adversaries for the mastery. Absence of such after circumstances, alone, has been held to be fatal to conviction, notably in *Bohlmann v. State,* 98 Wis. 617, 74 N. W. 343; *O'Boyle v. State,* 100 Wis. 296, 75 N. W. 989; *Devoy v. State,* 122 Wis. 148, 99 N. W. 455. In the latter case the circuit court sent the case to the jury, mainly, as here, on general declarations of the prosecutrix, which, on appeal, were said to be of no probative force whatever.

MILWAUKEE SMELTING & REFINING COMPANY, Respondent, vs. LINDENBERGER, Appellant.

December 10, 1909—March 16, 1910.

Corporations: Subscription to stock: Tender of certificate: Release of subscriber: Abandonment of enterprise: Examination of officer as adverse witness: Harmless error.

1. Tender of a stock certificate is not a condition precedent to liability upon a stock subscription, in the absence of any stipulation to that effect in the agreement.
2. Where a subscriber to stock who has paid only a portion of his subscription tenders his resignation as an officer and director and states his decision not to take any more stock than he has already paid for, action of the board of directors in accepting his resignation and instructing the secretary to send him formal assignments for the transfer of his subscription (which the subscriber never executes or returns) is insufficient to effect the cancellation of his subscription or to release him from liability thereon.

3. Proof of the sale of the property of a corporation and a suspension of business activity for the time being does not show such an abandonment of the business enterprise for which the corporation was organized as will relieve from liability a subscriber for stock, where it does not appear but that the company may resume its business upon payment of the unpaid stock subscription.
4. Refusal to permit the examination of the former secretary of the plaintiff corporation as an adverse witness did not affect the substantial rights of the defendant in this case, he having been accorded the privilege of a full examination upon everything pertaining to the issues, and the material facts having been presented to the court.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Steps were taken for the organization of the plaintiff corporation with a capital stock of seventy-five shares of the par value of $100 each, and at a meeting on July 26, 1906, the defendant and five others delivered to the plaintiff their subscription agreement, whereby each of the six persons subscribed for seven and one-half shares of stock; the par value of five shares to be forthwith payable in cash, the remaining $250 to be payable pursuant to the call of the board of directors. Defendant paid $100 on his subscription. Defendant was present and participated in the stockholders' meeting and was elected a member of the board of directors. At the meeting of the board which was held later in the day he was elected president of the board. On August 30, 1906, the defendant wrote to the plaintiff resigning the offices of president and director and stating:

"Owing to the arrangements you have made without my consent, I have decided not to take any more stock than I have paid in."

At the meeting of the directors held on the next day the resignations were accepted. The minutes of the meeting show the following:

"It was moved and seconded to instruct the secretary to notify *H. Lindenberger* of the acceptance of his resignation

as president and director; also to send him agreements for the transfer of his subscription to the capital stock as he expressed his desire to withdraw from the company."

On the same day the secretary wrote the defendant, stating among other things:

"Your resignation as president and director does not relieve you from your liability on your subscription. You still owe the *Milwaukee Smelting & Refining Company* $400 on your subscription to capital stock, which is owing without call, and $250 which is subject to the call of the board of directors. However, there are other responsible parties who are willing to assume your unpaid subscription and take the six and one-half shares for which you are still liable. If you will sign the inclosed assignment to the right to such six and one-half shares and return it, you will be released from further liability on your subscription. If we find a purchaser for the share of stock it will be taken off your hands. You may also execute the inclosed assignment of the one share held by you and send it to the First National Bank of this city with instructions that if $100 is paid on your account the assignment should be delivered. In such case as soon as we have a purchaser for such share of stock we shall cause the $100 to be paid to the bank."

On September 5, 1906, the secretary wrote the defendant as follows:

"Referring to your conversation with Messrs. Sadek and Levy, we wish to inform you that the writer has sold the six and one-half shares of stock for which you have subscribed, and also the one share for which you have paid, without the knowledge of Messrs. Sadek and Levy. [Sadek, Levy, and the secretary composed the board of directors.] The transfer agreements, which we sent you, we desire to have signed and returned, so that we are not obliged to put your letter of August 30th on file, as evidence of your desire to withdraw from this company. At the present time we have no stock for sale, but should we desire at any future date to increase our capital we possibly will give you a chance to subscribe for a portion of the same. . . . Thanking you for your prompt return of transfer agreements, we remain."

At a special meeting of the stockholders on December 11, 1906, the plant of the company was sold. The plaintiff brought this action to recover the $400 alleged to be due from the defendant on his subscription. This is an appeal from the judgment entered on the verdict directed by the court in favor of the plaintiff, which judgment amounts to $513.33.

For the appellant there was a brief by *Burke, Alexander & Burke,* and oral argument by *Louis A. Lecher.*

For the respondent there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *Nathan Glicksman.*

The following opinion was filed January 11, 1910:

SIEBECKER, J. The facts show that the defendant and five other persons had subscribed for the capital stock of the plaintiff company and agreed "to pay his subscription to the amount of five (5) shares forthwith in cash without resolution or call," and the remainder upon call of the board of directors; that this agreement was accepted by the company by corporate action, in which the defendant took part as stockholder; and that the defendant pursuant to such agreement paid for one share, participated in the company's organization, accepted the offices of director and president, and entered upon the discharge of his official duties by engaging in the conduct of the business and the management of its affairs. This amply establishes that the defendant was a member of the company and a stockholder and was liable for the amount of his unpaid stock upon the terms and conditions of the subscription agreement theretofore accepted by the company. We find no stipulation or condition in this stock-subscription contract requiring tender of a certificate as a condition of payment for the stock. It is apparent that nothing of this nature was contemplated by the parties, and it is manifest from the facts and circumstances that the company was ready and willing to deliver the proper certificate of stock to the defendant whenever he performed his obli-

gation by payment of the amount due on his stock subscription.

It is claimed that the plaintiff released and canceled defendant's liability as a stock subscriber. This claim is founded on the defendant's letter to the company of August 30, 1906, and the action thereon. In this letter the defendant tendered his resignation as president of the board of directors and as a director of the company. He also states that he had "decided not to take any more stock than he had paid in," and if it were preferred not to have him hold any stock he would be pleased to sell the paid-up share at the cost price. The board of directors on the following day, at a regular meeting, accepted defendant's resignation as president and director and instructed the secretary to notify the defendant thereof, and, in view of his expressed desire to withdraw from the company, to send him formal agreements for the transfer of his capital stock. Notice of this action of the board of directors was immediately communicated to the defendant by the letter of the secretary, which stated that his resignation from the offices did not release him from liability on his stock subscription, suggested that other parties stood ready to purchase his unpaid stock, and stated that if he would sign and return the inclosed agreements, assigning the stock, he would be released from further liability. Defendant never executed or returned these agreements. The steps taken by the officers of the corporation are insufficient to effect a cancellation of defendant's stock subscription, nor do they operate to release him from his liability.

The claim that defendant's stock had in fact been sold by the company's officers is not sustained by the evidence. In their most favorable light the evidential facts tend to show that there may have been negotiations for such a sale by some of the officers, but the evidence fails to show that a sale of the stock was ever consummated.

The contention that there was an abandonment of the en-

terprise for which the corporation was organized is not established. The facts at most show a sale of the property it owned and a suspension of business activity for the time being. There is, however, no showing that there has been a total and final abandonment of the business enterprise for which the corporation was organized, nor does it appear but that the company may resume its business upon payment of the unpaid stock subscription. Under the circumstances the defendant is not relieved from liability upon this ground.

An exception is urged to the refusal of the court to permit the appellant, under sec. 4068, Stats. (1898), as amended by ch. 271, Laws of 1907, to examine the company's former secretary as an adverse witness. We have examined the record and find that the ruling in no way affected the substantial rights of the appellant. He was substantially accorded the privilege of a full examination upon everything pertaining to the issues of the controversy, and the material facts were presented to the court. Hence the substantial rights of the defendant were not affected. Sec. 2829, Stats. (1898), and sec. 3072*m*, Stats. (Laws of 1909, ch. 192).

By the Court.—Judgment affirmed.

TIMLIN, J., took no part.

A motion for a rehearing was denied March 16, 1910.

GRANT MARBLE COMPANY, Respondent, vs. ABBOT, Appellant.

December 7, 1909—April 5, 1910.

Contracts: Reformation: Mistake: Fraud: Burden of proof: Rescission: Negligence: Building contract: Promise by owner to pay loss sustained: Appeal: Reversal: Further proceedings: Equity.

1. Where the minds of the parties met upon the terms of a contract executed by them, or where, in the absence of fraud, a mistake was that of one party only, the contract will not be reformed.
2. One asking reformation of a contract must show that the minds of the parties met upon the contract which he seeks to establish.
3. If by the fraud of one party the real contract is not expressed in the writing, and the other party by mistake receives such writing as the real contract, reformation may be had.
4. The fact that the price for which plaintiff, through its president, contracted to do certain marble work in six stories of defendant's building was, by mistake of such president, based upon estimates which had been made by plaintiff's architect for work in five stories only, did not entitle plaintiff to reformation of the contract, where both parties understood and agreed to the terms of the contract as made, and intended no other, and the mistake was not induced by defendant nor known to him at the time.
5. A court of equity will not rescind a contract upon which the minds of the parties met, merely because one of them, without the knowledge of the other, was laboring under a mistake.
6. Where plaintiff seeks to reform or rescind a contract because of his own mistake, of which he claims defendant had knowledge, the burden is upon him to establish such knowledge by clear and satisfactory evidence.
7. One who seeks to rescind must act promptly upon discovery of the facts which he claims entitle him to rescission, and must take no steps in affirmance of the contract. Thus, a contract will not be rescinded for mistake where the party asking such relief completed the contract and afterwards brought an action to reform it.
8. One cannot rescind a contract for mistake due to his own want of ordinary care.
9. Where the owner of a building, upon being informed by a contractor for work therein that, through a mistake in basing his

figures upon estimates for five instead of for six stories, the price for the work had been fixed too low, replied that he did not wish the contractor to suffer a loss on the contract, directed him to complete the work, and said that a fair settlement would be made, the contractor could not recover upon a *quantum meruit*, but could recover the amount of any loss actually sustained by him on the contract, *i. e.* any sum in excess of the contract price necessarily expended in doing the work.

10. In an action to reform a building contract and to recover the reasonable value of work alleged to have been included in the contract by mistake, the supreme court, upon reversing a judgment for plaintiff upon the ground that he was not entitled to such relief, might properly direct that the action be dismissed upon the merits; but, a later promise by defendant to pay any loss sustained by plaintiff on the contract having been shown, the plaintiff, under the liberal rules of practice in equity, is given the right to elect, upon payment of all costs down to the date of such election, to take further evidence as to whether there was a loss on the contract, for the purpose of ending the litigation.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

The complaint in this action alleges the making of a contract between plaintiff and defendant by the terms of which plaintiff agreed to do certain marble work in the six stories of the defendant's building known as the Colby & Abbot building in the city of Milwaukee, Wisconsin, for the sum of $24,150, and that through mistake on the part of one Grant, president of the plaintiff, he included in such contract work and material for only five stories of such building, while the contract covered the six stories. It is further alleged that the agent of defendant either fraudulently concealed the fact or did not know or appreciate that the additional work was included in the contract; that the original specifications for the job included only five stories, while the specifications upon which the contract was made included six stories, and that Grant, president of plaintiff, did not know that the

original specifications, calculations, and bid based thereon had not included any work for the sixth story; that after plaintiff discovered the mistake it, through its agent, took the matter up with defendant's manager, who ordered the work to be done on the sixth story and promised on behalf of defendant to make it right. The plaintiff finished the sixth story in marble the same as the story below, which was reasonably worth $2,882.05, which defendant refused to pay, claiming that the item was covered by the contract between the parties. The prayer is for reformation of the specifications and contract on which they are based so as to confine the marble work to five stories, and, further, that defendant pay for the work and material in the sixth story what the same was reasonably worth, and for general relief.

Defendant moved to make the complaint more definite and certain by separately stating the two causes of action and by electing whether plaintiff stands on its action to reform the contract referred to in the complaint and recover upon the contract as reformed for the work and material alleged not covered thereby, or upon the cause of action attempted to be stated upon alleged promise by defendant to pay in addition to the contract price, and that part of the complaint be stricken out, which motion was denied.

The defendant answered, and the court found substantially: That in October, 1905, defendant, through his architect, called upon plaintiff to make estimates and a bid upon marble wainscoting in the corridors of said building, and at said time there were corridors partitioned off in the first to the fifth stories, inclusive; that the outer walls of the sixth story were in course of construction, but the interior had no existence; that plaintiff sent one Martin, an employee, to said architect for the purpose of receiving instructions and making measurements, and that the architect pointed out to Martin the character of the wainscoting required in each of the five stories and asked him to make measurements of the

same and that the plaintiff submit a bid therefor, at the same time informing him that the manner of finishing the sixth story, then in course of construction, and the work required therein had not been determined; that said architect also submitted to said Martin certain written specifications for such wainscoting, calling for the same for the first, second, third, fourth, and fifth stories only; that said Martin thereupon made measurements of all of said corridors in which said work was to be done and submitted same to the plaintiff; that plaintiff thereupon, on October 27, 1905, submitted to said architect, through J. E. Heimerl, its agent charged with making estimates and bids in its behalf, a bid offering to do said marble work for $20,050; that thereafter, and prior to the 11th day of November, 1905, said plaintiff was informed by said architect that additional marble work was required for said building of which items were given plaintiff; that said plaintiff was also asked to submit a bid for putting marble floors in parts of the first story of said building and in the corridors of the second, third, fourth, and fifth stories thereof; that plaintiff prepared a bid thereon in writing, dated November 11, 1905, and caused the same to be sent to the office of said architect, but the evidence does not convince the court that said architect received it; that prior to the 29th day of October, 1905, said architect had prepared specifications calling for marble wainscoting, also specifications for the floors, calling for tile flooring, and had received bids on behalf of said specifications, said floor specifications being confined to the first, second, third, fourth, and fifth stories of said building; that on the 29th day of October, 1905, it was concluded at a conference between defendant, his secretary at Milwaukee, and said architect to finish all corridors in said building, including corridors thereafter to be laid out in the sixth story, with marble floors and marble wainscoting; that no notice of such change of plan or enlargement of the work was ever given to plaintiff or any agent of

plaintiff nor to any other contractor; that the specifications theretofore made by said architect remained on exhibit in his office and were not changed or amended, nor was any specification calling for marble floors or marble wainscoting in the sixth story ever prepared by said architect, but long after said date, and on or shortly before the 14th of November, 1905, a copy of the aforesaid specifications was delivered to said Heimerl, representing the *Grant Marble Company;* that said *Grant Marble Company,* through said Heimerl, made its estimate of the cost and value of doing said work according to the information and the specifications so furnished by said architect; that the final instructions of said architect included some other items of work and said Heimerl figured up the total cost and value thereof at $27,821; that on the 14th of November, 1905, said architect called up W. J. Grant, president of plaintiff, who was then in Chicago, by telephone, asking him to come to his office with the view of a contract on the building of said defendant; that said Grant, in pursuance of such message, came to Milwaukee on said day and proceeded directly to the office of said architect; that said Grant had taken no personal part in examining the specifications or the extent of work required thereby or by instructions of said architect, but the same had been wholly attended to by said Heimerl; that said Grant met said Heimerl at the office of said architect and was informed by him that the total of said work amounted to the aforesaid sum of $27,821, and that a reduction from said figures was desired; that said Grant, said Heimerl, and said architect thereupon proceeded to the office of Miss Bright, secretary of said defendant, in the same building, and said Grant then and there informed said architect and Miss Bright in the presence of said Heimerl that the bid of the *Grant Marble Company* for the work in question would be said sum of $27,821; that said architect and said secretary asked for a reduction of the amount, and said Grant thereupon suggested the change of

material which would somewhat cheapen the cost, and also made concessions of price, reducing said bid to $24,150, which was acceptable to said secretary and architect, subject to the approval of the defendant, which was afterwards given; that in making said final bid said Grant was not informed of any work required in any way adding to or extending the work which had theretofore been exhibited to said Heimerl by said specifications and the instructions of said architect; that said Grant thereupon offered to put the specifications for the contract in proper shape; that he drew the same, and, knowing that said building was being enlarged to six stories and supposing that the floors and wainscoting in the corridors of each of such stories was embraced in the work submitted to and estimated by said Heimerl, he drew the same covering such work in six stories of said building; that said Grant was at that time in a state of mental distress by reason of the critical illness, which shortly afterwards terminated in death, of his son, by reason whereof he was less careful in examining the premises than he otherwise would have been; that when he submitted said specifications to said architect and Miss Bright no information was given to him of the extent of the work which had been submitted to said Heimerl as aforesaid; that in the month of January, 1906, and before any work had been done on said sixth floor, said Heimerl discovered that said specifications called for marble floors and marble wainscoting in the sixth story of said building and he at once called the attention of said Grant to the mistake, and said Grant thereupon called upon the secretary of said defendant and showed her the specifications and the schedules of the *Grant Marble Company* giving the itemized figures of the bid, and that the same related to five stories only in accordance with said specifications; that said secretary said she would write to the defendant about it, and a few days later read to said Grant a portion of a letter received by her from

defendant dated January 22, 1906, of which the following is a copy:

"Replying to yours of the 20th about Mr. Grant, I appreciate what you say and I do not want him to make a loss on his contract. You can tell him that I will personally take up the matter with him when the work is all finished and see what is really fair. I do not propose to have him make a loss for a mistake, especially under the circumstances; but we cannot adjust the matter now. You are quite right in saying that he can rely on a thoroughly fair settlement, when it is all over and we can see just where he stands. Meantime, let him go ahead, and do everything just as well as he can, and I do not think he will be sorry for it."

That, relying upon the promises contained in said letter, said *Grant Marble Company* completed all the marble work desired for said building, including the laying of marble floors and putting in marble wainscoting in the sixth story thereof; that there was no fraudulent intent on the part of defendant or his agents, but that said mistake on the part of said Grant was induced by the acts and omissions of the defendant's agents hereinbefore stated; that it appears by testimony given on behalf of plaintiff that the total work done and material furnished amounted to and was reasonably worth $28,493.73, including the floors and wainscoting in the sixth story, which at the contract rates amounts to and is reasonably worth the sum of $2,882.05; that the defendant has paid on account thereof $25,612.18, leaving a balance of $2,881.55; that all of said work was completed in 1906; that on or about the 23d day of February, 1907, the plaintiff rendered a bill to defendant for said sixth-story work, amounting to said balance of $2,881.55, which defendant refused to pay, and insisted that all of said work was covered by said contract and that he was under no obligation to pay therefor.

The court concluded that said plaintiff is entitled to judgment rescinding the contract and for judgment against the

defendant for the reasonable value of the entire work done, not exceeding, however, the rates of said contract less the amount of payments made; and, if the defendant so desires, the court will receive further evidence upon the subject of reasonable value of said work and material not exceeding the rates of said contract, or, if defendant desires, will cause said question to be determined by a jury. The defendant is required to serve and file written notice to this effect, if he so desires, within five days after service of a copy of these findings, and, unless defendant files such notice within such time, judgment will be rendered for plaintiff rescinding the contract and for the sum of $2,881.55, with interest from February 23, 1907, and the costs of this action.

Judgment was entered for plaintiff in accordance with the conclusions of law, from which this appeal was taken.

For the appellant there were briefs signed by *Edwin H. Abbot, Jr.*, of counsel (*Howard Morris* and *Charles M. Morris*, attorneys), and oral argument by *Mr. Abbot.*

For the respondent there was a brief by *Winkler, Flanders, Bottum & Fawsett*, and oral argument by *F. C. Winkler.*

The following opinion was filed January 11, 1910:

KERWIN, J. While there are allegations in the complaint pertinent to an action for rescission, from the whole complaint it is manifest that the idea of the pleader was to state a cause of action for reformation. But the complaint also alleges a promise, either express or implied, on the part of defendant to pay for work in the sixth story what the same was reasonably worth. If it were necessary to pass upon the action of the court below in overruling the motion of defendant to make the complaint more definite and certain, we might find it difficult to sustain such ruling. But we do not pass upon the question, since it appears plain that the judgment below must be reversed upon the merits, and therefore technical errors need not be treated. It is entirely clear

from the findings and the evidence that no case for reformation was made. The contract attacked either by way of reformation or rescission is that made for the work on the six stories for the agreed price of $24,150. The minds of the parties met upon this contract, hence there is no ground for reformation. There was no mutual mistake. The parties to the contract made the contract they intended to make. Even if a mistake were made, it is established that it was the mistake of Mr. Grant, president of plaintiff; hence was not mutual. To allow reformation in this case would be to justify the court in making a contract for the parties which they themselves did not make. This the court cannot do. The plaintiff must show that the minds of the parties met upon the contract which it seeks to establish. *Lake v. Meacham,* 13 Wis. 355; *Ledyard v. Hartford F. Ins. Co.* 24 Wis. 496; *Petesch v. Hambach,* 48 Wis. 443, 4 N. W. 565; *Braun v. Wis. R. Co.* 92 Wis. 245, 66 N. W. 196; *Kruse v. Koelzer,* 124 Wis. 536, 102 N. W. 1072; *Auer v. Mathews,* 129 Wis. 143, 108 N. W. 45. The court below, however, did not reform the contract, but awarded judgment to the plaintiff for the reasonable value of the work done not exceeding contract rates, less payments. Counsel for respondent argues that a contract may be reformed where there is mistake on one part and fraud on the other, and cites on this point *James v. Culler,* 54 Wis. 172, 10 N. W. 147. But the doctrine of that case is not out of harmony with other cases on the subject in this court. It recognizes the universal rule that there must be a contract upon which the minds of the contracting parties met, which is not expressed in the writing sought to be reformed, the purpose of the reformation action being to conform the written contract to the real contract made by the parties. And in case a fraud is practiced by one party by which the real contract is not reduced to writing and the other party by mistake receives such writing as the real contract, equity will lend its aid to the party thus defrauded.

In *James v. Cutler, supra,* there was an agreement to convey land, and it appeared that by mistake of both parties, or by the fraud of the grantor and mistake of the grantee, all the land agreed to be conveyed was not included in the deed, and it was held that equity would reform. But here no case was made for reformation for two reasons: First, no contract was made except that reduced to writing; and second, there was no fraud on the part of the defendant. The court below found that there was no fraudulent intent on the part of defendant, and could not have found otherwise on the evidence. But the court further found that the mistake on the part of Grant, president of the plaintiff, was induced by the acts and omissions of the defendant's agents, and it is upon this finding that the plaintiff predicates fraud. Just what acts and omissions of defendant's agents induced the contract is not specified in the finding. From the argument it is obvious that the contention is that because the agents of defendant knew that the architect of plaintiff first made a bid on five stories and that the plaintiff adopted five-story figures on a six-story contract, there was a mistake of fact sufficient to avoid the contract, or mistake on the part of plaintiff and fraud on the part of defendant entitling plaintiff to reformation. The proof shows clearly that Grant, president of plaintiff, made the contract with full knowledge that it covered six stories of the building, and signed it with such knowledge. The defendant also signed it so understanding it. No other or different contract was intended to be made by the parties. But counsel for plaintiff claims that Grant made a mistake in applying five-story figures to a six-story contract. If so, such mistake cannot be charged to defendant, but must rest upon the party whose negligence caused it. All the facts were within reach of Grant, and he had but to open his eyes and see them. His own architect, Heimerl, who had full knowledge of the facts, was within call, and could have been consulted upon the subject if Grant had de-

sired. But he took it upon himself to figure the six-story contract and make the figures, and the contract so made was signed and agreed to by both parties. There is no merit whatever in the claim that the acts and omissions of the agents of defendant were of such a character as to mislead Grant. There is no evidence that the agents of defendant were conscious of Grant's alleged mistake, and no reason why they should have been. They knew that the architect of plaintiff, with whom Grant was in communication, had full knowledge of the facts, and had a right to assume that Grant was fully informed. We deem further discussion of the point unnecessary. It is very clear that no case for reformation of the contract was made. *Kruse v. Koelzer,* 124 Wis. 536, 102 N. W. 1072.

The court below did not find that the plaintiff was entitled to reformation, but rescinded the contract. It is also clear that the court was in error in rescinding the contract. Even if steps had been seasonably taken to rescind, there is no evidence in the record which would warrant rescission. We have seen that there was no mutual mistake and that the minds of the parties met upon the contract, and it does not appear that any agent of the defendant knew that Grant or any agent of the plaintiff was laboring under a mistake. Under such circumstances a court of equity will not rescind. *Johnson v. Parker,* 34 Wis. 596; *J. A. Coates & Sons v. Buck,* 93 Wis. 128, 67 N. W. 23; *Brillion L. Co. v. Barnard,* 131 Wis. 284, 111 N. W. 483. The burden of proof was upon the plaintiff to prove by clear and satisfactory evidence that the defendant or his agents knew of Mr. Grant's mistake. *Bowe v. Gage,* 127 Wis. 245, 106 N. W. 1074; *Lavassar v. Washburne,* 50 Wis. 200, 6 N. W. 516; *Shaw v. Gilbert,* 111 Wis. 165, 86 N. W. 188; *Deering v. Hoeft,* 111 Wis. 339, 87 N. W. 298; *Russell v. Scofield,* 134 Wis. 21, 113 N. W. 1094; *Parker v. Hull,* 71 Wis. 368, 37 N. W. 351; *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118; *Braun*

v. Wis. R. Co. 92 Wis. 245, 66 N. W. 196; *Blake O. H. Co. v. Home Ins. Co.* 73 Wis. 667, 41 N. W. 968; *Seeman v. Biemann,* 108 Wis. 365, 84 N. W. 490. Nor is there any finding of knowledge on the part of defendant of Grant's alleged mistake, and there is a finding that there was no fraudulent intent on the part of defendant. Moreover, if the plaintiff ever had a right to rescind, it failed to seasonably exercise such right, but proceeded to complete the contract and brought an action to reform. One who seeks to rescind must act promptly upon discovery of the facts which he claims entitle him to rescission and take no steps in affirmance of the contract. *Booth v. Ryan,* 31 Wis. 45; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Pfeiffer v. Marshall,* 136 Wis. 51, 116 N. W. 871. And where a mistake occurs through a party's own want of ordinary care by reason of which he sustains loss, he cannot rescind. *Standard Mfg. Co. v. Slot,* 121 Wis. 14, 98 N. W. 923; *Warner v. Benjamin,* 89 Wis. 290, 62 N. W. 179; *Kaiser v. Nummerdor,* 120 Wis. 234, 97 N. W. 932; *Mamlock v. Fairbanks,* 46 Wis. 415, 1 N. W. 167; *Farr v. Peterson,* 91 Wis. 182, 64 N. W. 863; *Van Beck v. Milbrath,* 118 Wis. 42, 94 N. W. 657; *Metcalf v. Mut. F. Ins. Co.* 132 Wis. 67, 112 N. W. 22. It follows under the repeated decisions of this court upon the established facts that the plaintiff was not entitled to a rescission.

But it is further argued by counsel for respondent that by force of certain communications between Grant, president of plaintiff, and the agent of defendant, a new promise was made to pay for the sixth-story work. This contention is predicated upon the letter written by defendant to his agent set out in the statement of facts. Afterwards, in reply to a communication by plaintiff asking if it could draw for money, defendant replied positively that it could not, and that he was under no obligation to pay anything above the contract price and that he owed nothing legally, and that whatever he

might do was purely a gratuity. The letter above referred to was written by defendant in reply to a letter from Miss Bright, secretary of defendant, in which she stated that Grant claimed the alleged mistake, if not corrected, would cause the plaintiff a loss of $3,000. The case was tried on the theory of recovery on *quantum meruit* and not for amount of loss sustained. In fact, it is claimed by appellant that the evidence shows a profit of $672, but it is manifest that the question of whether there was a loss was not tried; the theory of the plaintiff being that it was entitled to recover the reasonable value of the work in the sixth story, not exceeding contract rates. The defendant contends that he is not liable for any sum above the contract price on any theory, upon the ground that the correspondence did not amount to a promise and that his agent had no authority to bind him in that regard. We are inclined to the opinion, and so hold, that the plaintiff is entitled to recover whatever loss it actually sustained upon the contract made in writing, but beyond that plaintiff has made no case entitling it to recover anything. Of course, plaintiff did not prosecute the case, as we have seen, upon the theory of recovery for the loss sustained, and therefore should pay the costs incurred. Upon the record and under the rules of pleading and procedure, this court would doubtless be justified in ordering dismissal of the action on the merits. But, under the liberal rules of practice in equity cases, we think the court is warranted in holding the case for the purpose of ascertaining the amount of loss, if any, that has been sustained by plaintiff on the contract and thus end the litigation in this suit. *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; *Fleming v. Ellison*, 124 Wis. 36, 102 N. W. 398; *Franey v. Warner*, 96 Wis. 222, 71 N. W. 81; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532; *Cole v. Getzinger*, 96 Wis. 559, 71 N. W. 75; *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55; *Stevens v. Coates*, 101 Wis. 569, 78 N. W. 180. We shall therefore order the case dismissed

unless the plaintiff elects to take further evidence on the question of whether it did in fact sustain a loss on the contract and the amount thereof, and pay all costs incurred up to the time of filing such election. By the word "loss," as above used, is not meant loss of profits, but any sum in excess of the contract price necessarily expended in doing the job.

By the Court.—The judgment is reversed, and the cause remanded to the court below with directions to dismiss the complaint unless plaintiff shall, within twenty days from the filing of the *remittitur,* elect to take further evidence on the issue as to whether or not there was a loss on the contract, and, if so, the amount thereof, and pay all costs up to the time of filing such election, and, in case of failure so to do, the action be dismissed upon the merits, with costs.

Upon a motion for a rehearing there was a brief for the respondent signed by *Winkler, Flanders, Bottum & Fawsett,* attorneys, and *F. C. Winkler* and *Charles F. Fawsett,* of counsel; and for the appellant a brief by *Frank M. Hoyt.*

The motion was denied April 5, 1910.

BARKHAUSEN, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and another, Respondents.
SAME, Respondent, vs. SAME, Appellants.

January 12—April 5, 1910.

Deeds: Construction: Extrinsic evidence: Reservation for benefit of grantor: Covenants: Easements: Appurtenant to land: Subsequent conveyance: Right of way for railroad: Proper use of spur track: Condemnation proceedings: Parties.

1. A deed conveying all of a certain tract of land except a strip on each side thereof and providing that a railway company should have a right of way of designated width across the whole tract, but not specifying the ownership of the excepted strips nor

stating that the right-of-way clause was inserted for the benefit of those strips or either of them, was sufficiently ambiguous to warrant admission of extraneous evidence as to the circumstances surrounding the parties when it was executed.

2. It being shown that the grantor was the owner of one of the excepted strips when the deed was made, that it was valuable chiefly for factory sites, and that it could not well be reached by a spur track unless over the land conveyed, it sufficiently appears that the provision for right of way was inserted for the benefit of the grantor as owner of such adjacent strip.

3. A deed will be so construed as to effectuate the intention of the parties if the language used is reasonably susceptible of such construction.

4. A clause in a deed, inserted for the grantor's benefit, providing that "it is also understood" that a certain railway company shall have a right of way across the land conveyed, was a covenant, the word "understood" being equivalent to "agreed;" and upon acceptance of the deed such agreement became binding upon the grantee.

[5. Whether, in a grant of land, a reservation for the benefit of a third person is void, as stated in *Strasson v. Montgomery*, 32 Wis. 52, not determined.]

6. An easement, created or reserved in a grant, for the benefit of adjoining land of the grantor is appurtenant to such land and binding on that granted, and passes by a subsequent conveyance of the dominant estate without express mention in the conveyance.

7. The grantee of land subject to a railroad right of way for the benefit of an adjoining parcel cannot maintain condemnation proceedings because of the building and use of a spur track to serve such parcel, without showing that such track has been or is being used in some way not necessary or convenient for that service, so as to impose an additional servitude upon his land.

8. It is not essential in such case, in order to defeat the application for condemnation, that the railway company, relying upon the easement, should show that the spur track was actually built at the request of the owner of the parcel served thereby, where it appears that the track is essential to the beneficial use of such parcel.

9. The owner of a parcel of land to which a right of way for a railroad is appurtenant was properly made a party in condemnation proceedings instituted by the owner of the servient estate upon the ground that the construction and use of a spur track over his land was unauthorized.

APPEALS from an order of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed on defendants' appeal.*

For many years prior to February, 1903, William Finnegan owned a tract of land in Brown county fronting on the Fox river. It appeared from the testimony that the land was valuable for manufacturing sites, owing to its proximity to the city of Green Bay and the Fox river. On February 9, 1903, Finnegan deeded a portion of this parcel of land to the petitioner, *Barkhausen,* excepting two strips, each 274 feet in width, one on the north and one on the south of the parcel conveyed to *Barkhausen.* Prior to the execution of this deed, and in 1895, Finnegan entered into a lease with the *Chicago, Milwaukee & St. Paul Railway Company* for a private side track. This track was built in 1896, and extended through the strip of land to the north of the parcel sold to *Barkhausen,* and also a distance of about 343 feet into the land purchased by *Barkhausen.* Aside from this extension there was still another side track extending into the parcel of land purchased by *Barkhausen,* which, however, is of no materiality in this proceeding. The deed from Finnegan to *Barkhausen* contained the following clause:

"It is also understood that the *Chicago, Milwaukee & St. Paul* and the Chicago & Northwestern Railroad Companies have and shall have a joint right of way twenty feet wide across the whole of lot one (1) at a place where the track is now located, extended in a straight line across said lot."

Lot 1, above referred to, included the parcel of land sold to *Barkhausen* and the strips of land adjacent thereto on the north and south retained by Finnegan. On March 13, 1907, Finnegan conveyed to *J. W. Keogh* the strip of land lying to the south of the *Barkhausen* tract. It appeared from the testimony that *Keogh* bought with a view of erecting a manufacturing plant, and was intending to engage in the manufacturing business upon the site so conveyed.

On November 20, 1908, the *Chicago, Milwaukee & St. Paul Railway Company* extended its track through the *Barkhausen* tract and into the *Keogh* tract to a point near the south line thereof. The track extension of 1908 ran a distance of 470 feet on the land conveyed to *Barkhausen,* extending in a straight line from the portion of the track built on said parcel of land at the time *Barkhausen* purchased the same. Since its construction the *Chicago, Milwaukee & St. Paul Railway Company* has operated over said track, and the Chicago & Northwestern Railway Company has also operated over said track under a lease from the *Chicago, Milwaukee & St. Paul Railway Company.*

On November 25, 1908, *Barkhausen* began condemnation proceedings, and prayed for an order appointing commissioners to appraise and determine the value of the land taken by the railway companies. The *Chicago, Milwaukee & St. Paul Railway Company* answered, setting up, in substance, that it had the right to appropriate the twenty-foot strip of land for right-of-way purposes under the clause in the deed from Finnegan to *Barkhausen* hereinbefore set forth. The Chicago & Northwestern Railway Company did not interpose any answer, and on the hearing the proceeding was dismissed as to that company. *Keogh* appeared and answered, setting up substantially the same facts that were set up by the *Chicago, Milwaukee & St. Paul Railway Company.*

The court made an order appointing commissioners to assess the petitioner's damages, but provided in the order that the petitioner was "not entitled to any compensation for the use or operation which said *Chicago, Milwaukee & St. Paul Railway Company* has hitherto made, or shall hereafter lawfully make, of said side track at the request of the owner or lessees of the tract of land adjoining the aforesaid lands of the petitioner on the south, and for the purpose of any lawful use thereof, or business conducted thereon, by such owners or lessees aforesaid, while a certain provision in the deed

from William Finnegan and wife, conveying said land to petitioner, which provision relates to a right of way across said land, remains in force."

Both parties appeal from the order.

For the petitioner there was a brief by *Minahan & Minahan,* and oral argument by *R. N. Minahan.*

For the *Chicago, Milwaukee & St. Paul Railway Company* and *John W. Keogh* there were briefs by *Greene, Fairchild, North & Parker,* and oral argument by *B. H. Stebbins.*

The following opinion was filed February 1, 1910:

BARNES, J. By his deed of conveyance to *Barkhausen,* Finnegan conveyed all of a certain described parcel of land except two strips, each 274 feet in width, one lying immediately north and the other immediately south of the parcel conveyed. The deed was silent as to the ownership of these two parcels. It did not expressly state that the right-of-way clause was inserted therein because of the benefit that would result therefrom to the parcels of land in question or to either of them. The writing was sufficiently ambiguous to warrant the admission of extraneous evidence to show the circumstances which surrounded the parties at the time it was executed. *Bridger v. Pierson,* 45 N. Y. 601; 2 Page, Contracts, § 1123; *Merriam v. Field,* 29 Wis. 592; *Lego v. Medley,* 79 Wis. 211, 48 N. W. 375; *Mayer v. Goldberg,* 116 Wis. 96, 92 N. W. 556, and cases cited. From such evidence it appeared that Finnegan was in fact the owner of the south strip when the deed was made, and that it was valuable chiefly for factory sites. A spur track is a valuable, if not an indispensable, adjunct to such a site. The construction of such a track can be compelled only when the owner or lessee of the industry pays the cost of building the spur and of securing the right of way therefor. Ch. 352, Laws of 1907 (secs. 1797—11*m,* 1797—12*n,* Stats.). So, when the circumstances which surrounded the parties are

shown, it is obvious that Finnegan had an immediate interest to subserve by inserting the provision in the deed which is found therein in reference to right of way.

In construing deeds, as in construing other contracts, the fundamental inquiry is, What was the intention of the parties? Wherever this intention is apparent, the language used will be so construed as to effectuate it, provided such language is reasonably susceptible of such interpretation. *Fischer v. Laack,* 76 Wis. 313, 320, 45 N. W. 104; *Pritchard v. Lewis,* 125 Wis. 604, 610, 104 N. W. 989; *Chicago, M. & St. P. R. Co. v. H. W. Wright L. Co.* 123 Wis. 46, 50, 100 N. W. 1034; *Williams v. Jones,* 131 Wis. 361, 366, 111 N. W. 505; *Western L. & C. Co. v. Copper River L. Co.* 138 Wis. 404, 412, 120 N. W. 277; *Martin v. Cook,* 102 Mich. 267, 60 N. W. 679, and cases cited; *Coudert v. Sayre,* 46 N. J. Eq. 386, 19 Atl. 190; *Whitney v. Union R. Co.* 11 Gray, 359. We entertain no doubt that Finnegan inserted the clause in question in his deed to *Barkhausen* for his own benefit as owner of the tract of land afterwards conveyed to *Keogh,* which adjoined that sold and which could not well be reached by a spur track that did not pass over the land conveyed to *Barkhausen.* This parcel of land was purchased by *Keogh* for a manufacturing site, and he was about to erect a manufacturing plant thereon when the spur track was built. The able trial judge was right in holding that the right-of-way provision in the deed was one which inured to the benefit of the grantor therein, and which was in fact inserted for his benefit as owner of the adjacent parcel of land.

It is no less apparent that the language used is a covenant. The word "understood," as used in the sentence in question, is synonymous with the word "agreed." *Higginson v. Weld,* 14 Gray, 165, 170. By accepting the deed, the agreement contained therein, in form, became as binding upon the grantee as if he had in fact signed the instrument. *Hutchinson v. C. & N. W. R. Co.* 37 Wis. 582, 602. Words of cove-

nant are as effectual as words of grant. *Boyden v. Roberts*, 131 Wis. 659, 670, 111 N. W. 701.

Whether or not the language used in the deed technically created a reservation is immaterial. Finnegan had a perfect right to make a reservation for his own benefit, and we do not feel called upon to decide, on the record presented, whether a reservation in a grant of land for the benefit of a third person is void, as is stated in *Strasson v. Montgomery*, 32 Wis. 52.

"When it appears by the true construction of the terms of a grant that it was the well-understood purpose of the parties to create or reserve a right, in the nature of a servitude or easement, in the property granted, for the benefit of other land owned by the grantor, no matter in what form such purpose may be expressed, whether it be in the form of a condition, or covenant, or reservation, or exception, such right, if not against public policy, will be held to be appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burthen thus created and imposed will pass with the lands to all subsequent grantees." *Coudert v. Sayre*, 46 N. J. Eq. 386, 395, 19 Atl. 190; *Hagerty v. Lee*, 54 N. J. Law, 580, 25 Atl. 319.

This rule is stated in substantially the same language in *Whitney v. Union R. Co.* 11 Gray, 359, 365, and in substance in *Avery v. N. Y. C. & H. R. R. Co.* 106 N. Y. 142, 12 N. E. 619; *Post v. Weil*, 115 N. Y. 361, 375, 22 N. E. 145; and *Boyden v. Roberts*, 131 Wis. 659, 669, 111 N. W. 701.

The easement in question, having been created for the benefit of the adjoining land of the grantor, is appurtenant to such land, and passed to *Keogh* by the conveyance of the dominant estate without express mention in the deed of conveyance. *Karmuller v. Krotz*, 18 Iowa, 352, 358; *Tinker v. Forbes*, 136 Ill. 221, 242, 26 N. E. 503; *Boyden v. Roberts*, 131 Wis. 659, 669, 111 N. W. 701; *Borst v. Empie*, 5 N. Y. 33; *Morgan v. Mason*, 20 Ohio, 401; *Kent v. Waite*, 10 Pick. 138; *Hinchliffe v. Kinnoul*, 5 Bing. N. C. 1; *U. S. v.*

Appleton, 1 Sumn. 492, 502, Fed. Cas. No. 14,463; *Lansing v. Wiswall,* 5 Denio, 213; *Cathcart v. Bowman,* 5 Pa. St. 317.

The circuit court held, in substance, that the petitioner was not entitled to recover any damages because of an extension of the spur track to the parcel of land purchased by *Keogh,* provided it was built at *Keogh's* request and was used exclusively to serve any legitimate business that might be conducted on such site. Further, that any other or additional use to which the spur track might be put imposed an additional servitude on the land sold to *Barkhausen,* for which he was entitled to compensation, and commissioners were appointed upon the theory that, on the record made, an additional burden had been in fact imposed. This conclusion was reached because the defendant railway company asserted in its answer the right to use the twenty-foot strip for railway purposes generally, and because it was not shown that the spur track was built at *Keogh's* request. The record is barren of all proof to show that the spur track had been used for any purpose except to serve *Keogh.* Such track terminated upon his land; it did not extend to the river; it does not appear that it was used for the storage of cars, and it is difficult to see how it could have been used for any other purpose than to serve *Keogh,* except for the storage of cars. In any event, if it were so used, it should not be difficult to show that fact by proof.

There is much force in the reasoning of the learned trial judge to the effect that the railway company could not rely on the covenant under consideration unless it showed that the spur track was actually built at *Keogh's* request, which it failed to do. But the real question would seem to be whether the spur track was necessary for the beneficial use of the land conveyed to *Keogh.* On this point *Keogh* states, in his verified answer to the petition for condemnation, that he bought the 274-foot strip in question for manufacturing purposes and is about to erect and operate a large manufacturing

plant thereon, and that the side track is necessary for the erection and operation of such plant, and that he bought his site relying on the covenant contained in the deed to petitioner. This at least amounts to a positive declaration on his part that the side track is not only useful, but is essential to a full enjoyment of his land for the purpose for which he bought it.

The railway company having the right to build the spur track for *Keogh's* accommodation, it was incumbent upon the petitioner to show a taking of the right of way for some other and additional purpose before he was entitled to have commissioners appointed. After issue was joined, and before the order appealed from was entered, the railway company filed a writing in court by which it disclaimed any right, title, or interest in the twenty-foot right-of-way strip in question, save such right, title, or interest as it had therein by virtue of the provision contained in the *Barkhausen* deed. By virtue of the covenant in the *Barkhausen* deed the railway company had the right to build a spur track across petitioner's land for the purpose of serving the wants of *Keogh* as owner of the 274-foot strip on the south. Besides the assertion contained in *Keogh's* answer there is at least some proof to show that the track was essential to enable *Keogh* to use his land for the purpose for which he purchased it. The railway company did build such a spur track. There is no showing made that it was used for any purpose other than to serve the real estate to which the right of way over the *Barkhausen* land was appurtenant. The railway company disclaims any purpose or intention of using it for a purpose not contemplated and not authorized by the covenant contained in the deed to petitioner. Under such conditions we fail to see where the petitioner had shown any taking of his land by the railway company, or wherein he was entitled to recover any damages.

From the view we take of the case it is apparent that

Keogh was properly made a party in the condemnation proceedings.

By the Court.—The order of the circuit court is reversed on the appeal of the *Chicago, Milwaukee & St. Paul Railway Company* and *John W. Keogh,* but without prejudice to the right of the petitioner to institute other condemnation proceedings in the future in case the right-of-way strip across his land is being used for a purpose not warranted by the covenant contained in his deed, and the cause is remanded with direction to dismiss the condemnation proceeding. Ordered further that petitioner take nothing by his appeal.

The following opinion was filed April 5, 1910:

BARNES, J. The petitioner has filed a brief containing sixty-eight pages of printed matter in support of a motion for rehearing, in which it is argued with elaboration and reiteration that the decision of this court deprives the petitioner of his property without reward or compensation, and is contrary to well-settled legal principles. If this be true, an egregious blunder has been committed which should be remedied while it may be. But is it true? When the petitioner bought his land he bought it under an agreement contained in his deed that the railway companies should have a "joint right of way twenty feet wide across the whole of lot 1 at a place where the track is now located, extended in a straight line across said lot." It is admitted that the side track is built on the line indicated. Now, did petitioner buy and pay for the fee in the land, or did he buy and pay for the fee subject to the easement agreed upon? Did Finnegan sell him the fee, or sell only the fee subject to such easement? What did petitioner purchase and pay for, and what did Finnegan sell and receive pay for? Finnegan owned the factory site lying to the south of the land sold petitioner. Its value might largely depend on side-track facilities. Indeed,

the sale might not have been consummated at all without the right-of-way privilege. Now, it may be that petitioner thought he knew, or was advised, when he made his purchase that the provision referred to in his deed was what is technically known in law as a reservation; that such reservation was for the benefit of strangers to the deed, and that this court had once intimated, if not held, that such a reservation was void; and that the deed simply contained a "joker," the joke being upon the grantor, who thought he was holding out something when in fact he was conveying the entire fee. It is not supposable that the grantor had any such light upon the subject. He was attempting at least to impose a servitude upon the fee conveyed and was accordingly fixing his price upon the thing parted with. So that if petitioner got what he now claims to own, he got it inadvertently and without paying for it, and because his grantor failed to use suitable and appropriate language in his deed to express his intention. It is apparent, therefore, that the fight of the petitioner here is not so much to get pay for something that belongs to him as of right as it is to get something for nothing.

This court held, as did the trial court, that the clause in the deed was a covenant, and nothing has been said to shake our conviction that such view was correct. It also held that the clause was sufficiently ambiguous to admit parol evidence of the circumstances which surrounded the parties when the deed was made, and we see no reason for receding from this view. Those circumstances disclosed the interest which Finnegan had in providing for the easement. It was valuable in connection with the other land which he owned, and it was a logical and correct conclusion to draw that the easement created or reserved was appurtenant to such land and passed with it to Finnegan's grantee. The decisions cited in support of this proposition of law are directly in point and we believe are correct in principle.

From this point the case presents a very simple question, notwithstanding the claim of petitioner that he was misled

and deceived, and compelled to go into court to preserve his right, and that he is now being wrongfully turned out, with costs imposed on him for having ventured in. The railway companies had the right to construct a side track to serve *Keogh,* who was Finnegan's grantee. They might build such a track without paying any tribute to petitioner and without his leave. If such track were put to any additional use, an additional servitude would thereby be imposed on petitioner's land, for which he would be entitled to compensation. Whether or not it had been or was being so used was a pure question of fact which would easily be susceptible of proof. If the spur track was being so used when the condemnation proceedings were started, they were well founded; if not, they were not. Was the spur track used to serve other patrons of the railroad than *Keogh,* or was it used for the storage of cars or in some other manner not necessary or convenient for his service? If not, petitioner had suffered no damage. It rested with petitioner to establish the affirmative of this question as a condition precedent to his right to have commissioners appointed to appraise his damages. He did not do so. We fail to see how the alleged equivocal statements contained in the answer to the petition supplied this lack of proof, and we fail to see how or why petitioner was obliged to bring his proceeding when he did in order to protect himself from the operation of the statute of limitations, unless we assume that he could not ascertain the fact as to when the additional servitude was being imposed upon his land. It is the fact of the imposition of such a burden that is important, and not the secret, undisclosed intentions of the officers of the corporations. It is not apparent how the additional burden could possibly be imposed in any other than an open and notorious manner, readily discoverable by any one interested in the matter.

By the Court.—The motion for a rehearing is denied, with $25 costs.

ROWELL, Appellant, vs. BARBER, Executor, Respondent.

February 4—April 5, 1910.

Husband and wife: Oral antenuptial agreement reduced to writing after marriage: Statute of frauds: Execution of contract: Consideration: Jointure or pecuniary provision barring dower, etc.: Election by widow: Laches: Estoppel.

1. A written contract between husband and wife, reciting that the parties before their marriage, "having agreed to marry and intending to do so," made an agreement under which, "on account of such intended marriage and on account of the promises hereinbefore mentioned and hereinafter stated," certain real estate was to be settled upon the wife, and stating that other provisions of such agreement were made "on account of such intended marriage" and "by reason of such marriage of the parties," sufficiently shows tnat the oral agreement referred to was made upon consideration of marriage and hence was void under subd. 3, sec. 2307, Stats. (1898).
2. An oral antenuptial agreement, absolutely void under subd. 3, sec. 2307, Stats. (1898), cannot be validated by being reduced to writing and executed by the parties after marriage. Such a writing, though reciting the prior oral agreement, is merely a postnuptial contract.
3. Independent of the statute of frauds (subd. 3, sec. 2307, Stats. 1898) a jointure or pecuniary provision which shall operate to bar dower and all interest of a wife in the estate of her husband must, under secs. 2167–2170, 2172, Stats. (1898), be made, and be assented to by the wife in writing, before marriage. If not so made and assented to, the wife, after the husband's death, may elect to take the share of his estate provided for in sec. 2172.
4. An oral antenuptial agreement as to rights of the wife in the husband's property is not changed from an executory to an executed contract or taken out of the statute of frauds by the marriage.
5. The furnishing of support and maintenance by the husband to the wife cannot be considered as part performance of or consideration for such an agreement.
6. The execution by the husband of a conveyance of land to the wife in accordance with the terms of an oral antenuptial agreement which, after marriage, had been reduced to writing, and

the deposit of such conveyance in escrow to be delivered to the wife after the husband's death, was not such performance of the agreement as took it out of the statute of frauds.

7. The mere fact that after the death of the husband the wife assented to the recording of the conveyance above mentioned, took possession of the land, and collected some rents, did not preclude her, on the ground either of laches or estoppel, from afterwards, within the year limited therefor, electing to take the provision made for her by law, where she tendered back the title and possession of the land and the rents collected, and the estate had in no way changed its position because of her acts.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

On July 4, 1888, the plaintiff and one John S. Rowell were married. Afterwards and on the 19th day of April, 1892, the plaintiff and said Rowell entered into a contract in writing reciting therein that prior to their marriage they had made an oral antenuptial contract and setting forth said contract in the writing made and signed after their marriage. This contract set out in great detail all the alleged provisions of the oral antenuptial agreement and made the same a part of the agreement so made after marriage, which contract in writing was signed and sealed by said John S. Rowell and *Mary Rowell* on the 19th day of April, 1892, in the presence of two witnesses and acknowledged before a notary public. John S. Rowell died testate October 21, 1907, and recited in his will the antenuptial contract. The plaintiff duly filed her election October 10, 1908, to take the provision made for her by law instead of the provision made for her by will or the marriage settlement. Objections to said election were filed by the executor of the will of John S. Rowell, and such executor prayed that a hearing be had of the issues raised by the election and the objections thereto. The time and place of hearing were fixed and the issues heard in the county court and determined against the plaintiff. An appeal was taken and a trial had in the circuit court for Dodge county upon

the issues raised by the election and objections thereto, and the circuit court affirmed the judgment of the county court and adjudged that the plaintiff was entitled to take only the provisions made for her by the agreement of April 19, 1892, and the provisions made for her in the last will and testament of John S. Rowell, deceased, and no other part or share in his estate; and further adjudged that the plaintiff was not guilty of laches in the matter of filing her election, and that the written agreement made on the 19th day of April, 1892, is a valid antenuptial agreement and binding upon the plaintiff. The plaintiff appealed from said judgment to this court.

Geo. B. Swan, attorney, and *R. B. Kirkland,* of counsel, for the appellant.

For the respondent there was a brief by *Burke & Lueck,* and oral argument by *T. E. Ryan* and *M. E. Burke.*

KERWIN, J. The facts in this case are substantially undisputed. The first and important question presented is whether the so-called antenuptial contract is void. There is no dispute but that it was orally made before marriage and reduced to writing, signed, sealed, and acknowledged after marriage. The contract purports to have been made in consideration of marriage, and the first question arises as to whether it is void under subd. 3, sec. 2307, Stats. (1898), which provides that every agreement, promise, or undertaking made upon consideration of marriage except mutual promises to marry shall be void unless the agreement or some note or memorandum thereof expressing the consideration be in writing and subscribed by the party charged therewith. It is insisted by the appellant that an oral antenuptial contract is void under the statute referred to and cannot be validated by reducing it to writing and signing after marriage. This proposition is denied by respondent. The question is not free from difficulty. Nor are the authorities in the courts

of last resort in the different jurisdictions in harmony. The precise question appears never to have been passed upon by this court. Some point is made by respondent that there is a sufficient lawful consideration to support the contract independent of any consideration of marriage. But we shall spend no time in discussing this proposition, because from the four corners of the instrument we think it is clear that the consideration for the agreement was the promise by the plaintiff to marry John S. Rowell, deceased, which agreement could only be consummated and made valid, if at all, by the marriage. The contract recites:

"Whereas, the above-named John S. Rowell and the above-named *Mary Rowell,* now the wife of said John S. Rowell, then *Mary Schiller* and unmarried, having agreed to marry, and intending so to do, made an agreement as follows."

Then follow the terms of the agreement, which provides that "on account of such intended marriage, and on account of the promises and agreements hereinbefore mentioned and hereinafter stated," certain described real estate is agreed to be settled upon plaintiff. Other provisions of the agreement show that it was made in consideration of marriage by stating that such provisions were made "on account of such intended marriage" and "by reason of such marriage of said parties." It is therefore considered that the oral agreement made before marriage was made in consideration of marriage. *Mallory's Adm'rs v. Mallory's Adm'r,* 92 Ky. 316, 17 S. W. 737; *Henry v. Henry,* 27 Ohio St. 121. So we approach the question whether such oral agreement, entered into before marriage, by being reduced to writing and signed after marriage became a valid antenuptial contract. The obvious purpose of the written contract made after marriage, reciting the oral agreement made before marriage, was to remove from under the ban of the statute such oral agreement. It is plain that the written agreement relied upon as an antenuptial contract could have no force as such but for the oral

agreement made before marriage. It seems equally clear under our statute that the oral agreement was absolutely void. How a void agreement which has no vitality whatever can be brought into force and vigor by another agreement made by the parties after they are disqualified to make the one which is void is not easy to understand. If this can be done it is an easy way of avoiding the statute. If our statute were similar to the English statute of frauds and the statutes of the majority of the states which follow either literally or in substance the English statute, the proposition would be quite different. The English statute and those of most of the other states of the Union, except Wisconsin and New York, do not make the contract void, but provide that "no action shall be brought . . . to charge any person upon any agreement made upon consideration of marriage." Stat. 29 Car. II. c. 3 (1676), § 4. Or that "no action shall be brought in any of the following cases: . . . Third. To charge any person upon any agreement or promise made in consideration of marriage." Burns's R. S. Ind. 1901, § 6629 (4909). Or, "Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or his authorized agent: . . . (2) Those made in consideration of marriage." Iowa State Code, 1897, § 4625.

It will be seen from the foregoing, as well as the statutes of other states which might be cited, that there is a broad difference between our statutes and the statutes of most of the other states. This difference is vital, as was pointed out at an early day by this court. *Brandeis v. Neustadtl,* 13 Wis. 142. Under our statute the contract is made void, while under the other statutes referred to the remedy is suspended, or they make the evidence of such a contract incompetent. So there would be much reason in holding under the latter statutes that the contract being good at common law, though not in writing, and the statute operating upon the remedy

only or the character of the evidence necessary to establish such a contract, the evidence might be supplied by the parties after the making of the contract, which, though not void, was unenforceable for want of proper evidence. There is a very full discussion of the question by Chief Justice DIXON in *Brandeis v. Neustadtl, supra,* and the question has been several times considered by this court in later opinions. *Langley v. Sanborn,* 135 Wis. 178, 114 N. W. 787, and cases cited; *Popp v. Swanke,* 68 Wis. 364, 31 N. W. 916.

In *Brandeis v. Neustadtl, supra,* the court said (p. 149): "A contract declared void by statute is in all respects a nullity. It cannot for any purpose be considered as ever having had a being or existence." This being so, it is difficult to see how the oral antenuptial contract, void by the express provisions of the statute, could be converted into a valid antenuptial contract by a postnuptial agreement. Such a construction of the law would defeat the purpose of the statute.

In *Crane v. Gough,* 4 Md. 316, 332, the distinction is drawn between statutes which declare the contract void if not made in compliance with the statute of frauds and those which provide that no action shall be brought upon it.

It is true that in Iowa and Indiana it has been held that if, after making an oral antenuptial agreement, the parties after marriage reduce it to writing and in the writing recognize, put in force, and give effect to the prior oral agreement, the written contract will be given effect as an antenuptial contract though signed after marriage. But, as we have seen, the statutes of Iowa and Indiana on this subject are quite different from our own in the essential particular that they do not make the antenuptial oral agreement void, and we think the cases cited from Iowa and Indiana may be distinguished on that ground if upon no other. *Kohl v. Frederick,* 115 Iowa, 517, 88 N. W. 1055; *Buffington v. Buffington,* 151 Ind. 200, 51 N. E. 328; *Frazer v. Andrews,* 134

Iowa, 621, 112 N. W. 92. However, in Illinois, where the statute is practically the same as the English statute of frauds (Starr & Curtis, Ann. Stats. 2d ed. 1896, ch. 59, p. 1990), it was held that a verbal antenuptial agreement entered into, signed, and executed after marriage was void. *McAnnulty v. McAnnulty,* 120 Ill. 26, 11 N. E. 397.

In *Hunt v. Hunt,* 171 N. Y. 396, 64 N. E. 159, it was held under a statute similar to ours that an oral antenuptial contract is void, and that marriage in pursuance thereof is not such a part performance as will take it out of the operation of the statute of frauds. To the same effect are *Borst v. Corey,* 16 Barb. 136; *Bradley v. Saddler,* 54 Ga. 681; *Henry v. Henry,* 27 Ohio St. 121. It is true that the statute does not provide expressly when the note or memorandum shall be made and signed, and doubtless this might be done after the oral agreement was made and render such agreement valid where the relations of the parties had not changed and no rights intervened. Browne, Stat. of Frauds, § 224. But it seems plain that after the parties become disqualified to make an antenuptial contract they cannot by a postnuptial agreement infuse life into an oral antenuptial agreement which never before marriage had any legal existence. It is said in Browne on Statute of Frauds, § 224, speaking of the memorandum required by the statute of frauds: "The memorandum required by that section need not be contemporaneous with the making of the contract; it is only necessary that the evidence of the contract be put in that form, before any action can be maintained upon it,"—citing sec. 348 of the work, which does not appear to throw any light upon the particular question here. The statement in the text may have reference to statutes similar to the English statute of frauds when the contract is not void but the evidence of it is wanting, and which, if furnished before action brought, is sufficient; or the author may have had in mind cases where the relations of the parties or the subject matter had not so changed as to prevent completion of the contract. But in any event we

have been cited to no authority and have found none under a statute like ours which holds that an oral antenuptial agreement void under the statute of frauds can be validated by a postnuptial contract. Such a doctrine would in effect work a judicial repeal of the statute.

Other statutes respecting dower, jointure, and election further support the idea that the postnuptial agreement will not bear the construction contended for it by respondent, namely, that of an antenuptial contract. Secs. 2167, 2168, 2169, 2170, and 2172, Stats. (1898). Independent of the statute of frauds heretofore discussed, it is believed that the so-called antenuptial agreement cannot stand under the foregoing statutes respecting dower, jointure, pecuniary provision for intended wife, and election of widow. Sec. 2167 provides that a woman may bar all her dower in the lands of her husband by a jointure settled on her with her assent before marriage, providing such jointure consists of a freehold estate in lands for the life of the wife to take effect in possession or benefit before or immediately on the death of the husband. Sec. 2168 provides that such assent shall be expressed if the woman be of full age by her becoming a party to the conveyance by which it is settled, and, if she be under age, by her joining with her father or guardian in such conveyance. Sec. 2169 provides that any pecuniary provision that shall be made for the benefit of an intended wife and in lieu of dower shall, "if assented to as provided in the preceding section," bar her right of dower. Sec. 2170 provides that if any such jointure or pecuniary provision be made before marriage and without the assent of the intended wife, or if made after marriage, she shall make her election after the husband's death whether she will take such jointure or pecuniary provision or the share of his estate "hereinafter provided." Sec. 2171 provides that if any lands be devised to a woman, or other provision be made for her in the will of her husband, she shall make her election whether she will take the lands devised or the provision made or claim the

share of his estate provided in the following section, but shall not be entitled to both, unless it plainly appears by the will to have been so intended by the deceased; and sec. 2172 provides for making an election within one year after filing of petition for the appointment of administrator or for the probate of the will of the husband. These statutes clearly contemplate that the jointure or pecuniary provision therein provided for the wife which shall operate to bar dower and all interest in the property of the intended husband shall be made before marriage. The statutes were designed to provide not only for barring dower, but also all interest in the estate of the intended husband; hence provision is not only made for the jointure in bar of dower, but also pecuniary provision, and a valid antenuptial contract making pecuniary provision for an intended wife is valid and bars all her interest in the estate of her husband. *Deller v. Deller,* 141 Wis. 255, 124 N. W. 278.

As we have seen, the statutes provide in sec. 2167 for a jointure, and in sec. 2169 for pecuniary provision, in lieu of dower in each instance. Of course, it is perfectly plain that under secs. 2167 and 2168 the assent in case of jointure must be before marriage and in writing. And we think it equally plain that the assent in case of pecuniary provision under sec. 2169 must also be in writing and before marriage, because it provides that it must be assented to as provided in the preceding section. The alleged agreement here seems to partake of the nature of a jointure as well as a pecuniary provision, because it purports to settle real estate upon the plaintiff as well as make pecuniary provisions for the benefit of the intended wife. But whether the agreement be considered as a jointure settlement or pecuniary provision is not very material in this case, because it seems clear that under the statutes referred to the antenuptial agreement must be made and concluded before marriage and the assent provided for in the statute must be in writing and before marriage. *Fellers v. Fellers,* 54 Neb. 694, 74 N. W. 1077. Sec. 2170 seems in-

consistent with any other construction, because it provides that if such jointure or pecuniary provision be made before marriage and without the assent of the intended wife, or after marriage, she may make her election. Manifestly the assent to bar election contemplated by the statute either in case of jointure or pecuniary provision is assent before marriage given in the manner provided in secs. 2167 and 2168, Stats. (1898). The Wisconsin statutes referred to in express terms give the wife the right after the death of her husband to make her election whether she will take a jointure or pecuniary provision or take as heir under the statute. This applies to all jointures or pecuniary provisions made before marriage without the assent of the intended wife, and to all jointures or pecuniary provisions made after marriage whether assented to or not.

The pecuniary provision in question was, by reason of the statute of frauds of the state of Wisconsin heretofore discussed, a pecuniary provision made after marriage. It was not in any correct sense made before marriage and while it was absolutely void by reason of the statute of frauds. Sec. 2172, Stats. (1898), expressly provides that, when the widow shall be entitled to an election, upon making the same she succeeds to the same dower in lands of the deceased husband, the same right to the homestead, and the same share of the personal estate as if the husband had died intestate. There is no similar statute in Iowa or in Indiana, and the cases cited from these states to support the judgment below plainly go upon the ground that they are cases outside of the statute. There is by the Iowa statute no express election given to the wife to disregard any pecuniary provision made by jointure and to take as heir of the husband. The Indiana statute gives the following election to the wife (1 Burns's Ann. Stats. Ind. 1908, sec. 3042):

"If before her coverture, but without her assent, or if after her coverture, any such jointure or pecuniary provision shall be assured or given for her jointure, in lieu of her right to

one third of the lands of her husband, she shall make her election, within one year after the death of her husband, whether she will take such jointure or pecuniary provision, or whether she will retain her right to one third of the lands of her husband; but she shall not be entitled to both."

It will be observed that this statute relates only to the election of the wife to take in lieu of the jointure or pecuniary provision one third of the lands of her husband, and gives no other election to take as heir or to take any personal property; that it relates to a jointure or pecuniary provision assured or given in lieu of her right to one third of the lands of her husband, and not to a contract like that in the instant case. As to such contract, where the design is to cut the wife off from all interest of every kind in the estate of the husband, no election is given by the Indiana statute. Consequently the Indiana cases cited are treated as outside of the statute. The Wisconsin statute, however, gives the election to the widow generally as to all postnuptial contracts whether merely in lieu of dower or not, and as to some antenuptial contracts whether solely in lieu of dower or not.

Considerable stress is placed upon *Rieger v. Schaible,* 81 Neb. 33, 115 N. W. 560, by counsel for respondent. But we do not think the case is controlling. In that case it seems to have been conceded that a good antenuptial contract was made, but not in conformity with the jointure statute. It was held that the provision of the statute that a jointure barred dower did not ordinarily deprive the intended wife of the power to bar her dower by any other form of antenuptial contract. But the difficulty with the case before us is that there is no valid antenuptial contract of any kind; therefore, in the absence of such contract, the widow is not barred of her right of election. We therefore find it unnecessary to discuss a long line of authorities cited by respondent involving cases based upon valid antenuptial contracts, though not made in strict conformity to jointure

statutes, notably *Barth v. Lines,* 118 Ill. 374, 7 N. E. 679; *McGee v. McGee,* 91 Ill. 548; *Naill v. Maurer,* 25 Md. 532; *Logan v. Phillips,* 18 Mo. 22; *Stilley v. Folger,* 14 Ohio, 610.

Many cases are cited by respondent of property settlements carried out and executed, postnuptial contracts, as well as contracts while executory void under the statutes, but held good when executed; and it is argued that the agreement here had been executed, hence was valid and enforceable. This contention cannot be sustained. The marriage did not change the contract from an executory to an executed one as to the property relations under it. Agreements made before marriage respecting the property of the parties when executed by the transfer and delivery of the property may be good, though void under the statutes before execution. Also transfers and settlements after marriage may be good as postnuptial agreements. A few of the cases cited by respondent under this head will suffice to illustrate the difference between such cases and the one before us. In *Larsen v. Johnson,* 78 Wis. 300, 47 N. W. 615, the consideration of the contract was not the marriage of the parties, but the transfer of certain land by the intended wife to the intended husband, and such transfer was fully executed and the contract carried out on both sides, and it was held that the agreement, though not in writing, was fully executed and performed. It is said that, although the agreement to marry may have been made at the same time, it was no part of the consideration for the conveyance. 78 Wis. 306, 47 N. W. 615. *Goldsmith v. Darling,* 92 Wis. 363, 66 N. W. 397, does not seem to be in point. There it was held that while a written lease cannot be canceled by a parol agreement alone, an executed parol agreement to surrender will effect such cancellation. In *Andrews & Bros. v. Jones,* 10 Ala. 400, it is held that although a verbal contract made before marriage to convey property or make a settlement in consideration of marriage cannot be enforced, when executed it cannot be avoided

merely because the statute of frauds requires such contract to be in writing. To the same effect are *Hussey v. Castle,* 41 Cal. 239, and *Southerland v. Southerland's Adm'r,* 5 Bush, 591. In *Powell's Adm'r v. Meyers,* 23 Ky. Law Rep. 795, 64 S. W. 428, it was expressly held that a parol antenuptial agreement could not be enforced because void under the statute of frauds, but that a written postnuptial agreement could be enforced against the husband after it had been fully executed. In *Crane v. Gough,* 4 Md. 316, it was held that a parol antenuptial agreement that the husband was to have the wife's notes and bonds and allow him the interest on them, if executed is valid and sufficient to enable the representatives of the husband to defend their possession of such bonds and notes. *Milner v. Harris,* 1 Neb. (Unofficial) 584, 95 N. W. 682, merely holds that an agreement which has been performed is not within the statute of frauds. In *Kramer v. Kramer,* 90 App. Div. 176, 86 N. Y. Supp. 129, there was an antenuptial contract void under the statute of frauds by which the husband agreed before marriage to pay the intended wife a certain amount of money; after the marriage and in fulfilment of the contract the husband gave a note in payment of the amount in question, and the court held that when this was done it became an executed contract, and, having been performed, it was beyond the power of the husband to recall his act. *Satterthwaite v. Emley,* 4 N. J. Eq. 489, 43 Am. Dec. 618, was a case of settlement by a husband on his wife during coverture, and it was held good between the parties, though void as to creditors, and further held that recitals in the deed of settlement were not admissible to show an antenuptial agreement.

Further reference to this class of cases cited in respondent's brief is unnecessary. They merely state the well-recognized doctrine that where a contract void under the statute of frauds is executed it will be enforced. But the contract in the case before us was not executed. Marriage is not such a

part performance of an oral agreement as will take the case out of the statute. *Bradley v. Saddler,* 54 Ga. 681; Story, Eq. Jur. § 768; *Hackney v. Hackney,* 8 Humph. 452; *Hunt v. Hunt,* 171 N. Y. 396, 64 N. E. 159. No property was transferred to the plaintiff during the life of John S. Rowell under the agreement. A deed of real estate was deposited in a bank to be delivered to plaintiff upon the death of her husband, so no title passed under this deed before his death. The agreement being only postnuptial, the plaintiff might accept the provision made therein or elect to take under the law. She elected to take under the law and not under the agreement. So there was no performance which would take the agreement out of the statute of frauds. A great many authorities are cited by respondent, all of which have been carefully examined by the court. With the exception of those from Iowa and Indiana they bear remotely only upon the vital questions in the case before us. The Iowa and Indiana decisions as well as the great majority of cases cited by respondent are from states having statutes upon the subject involved quite different from ours. But counsel for respondent cites us to *Reade v. Livingston,* 3 Johns. Ch. 481, as an authority in their favor in a state where the statute is similar to ours. After a careful examination of this case we are unable to see that it supports the contention of counsel. The syllabus states:

"A settlement after marriage, in pursuance of a parol agreement entered into before marriage, is not valid; *aliter,* if made in pursuance of a written agreement prior to the marriage.

"Though a settlement after marriage recites a parol agreement entered into before marriage, it seems that it is not, therefore, valid against creditors.

"A voluntary settlement, after marriage, by a person indebted at the time, is fraudulent and void against all such antecedent creditors; and that without regard to the amount of the existing debts, or the extent of the property settled, or the circumstances of the party."

The principal question considered in that case was whether the marriage settlement was void as to creditors. The creditor having died, the contest was between his representative and the husband and wife. The wife was not contesting the marriage settlement. Besides, the deed of settlement had been executed, and the question was whether it was fraudulent as to creditors. In the opinion several cases are cited where a settlement after marriage in pursuance of a prior parol agreement was held good; but it is said that these were cases prior to the statute of frauds.

It is further suggested in the case before us that the plaintiff waived her rights under the election statute, was guilty of laches, and is estopped from claiming under the law. This contention is based upon the facts that a few days after the death of Rowell the deed to plaintiff of the real estate mentioned in the agreement made after marriage was, with the consent of plaintiff, recorded, and that she took possession of the property described therein and collected some rent. But it also appears that plaintiff made her election under the statute in due time, and tendered back a conveyance of the real estate and also the rents collected. The furnishing of support and maintenance by the husband was no part performance and consideration for the agreement. This he was obliged to do by virtue of the marriage. The law requires a husband to support and provide for his wife. Such requirement is grounded upon principles of public policy, and the husband cannot shirk it even by contract with his wife. *Ryan v. Dockery,* 134 Wis. 431, 114 N. W. 820. The plaintiff had a year to determine whether she would elect, and we find nothing in the record which prevented her from so doing when she did elect. The mere fact that she consented to the recording of the deed, or rather did not object when it was suggested by the person in whose hands it was that it be recorded, especially when she recalled it without practically any delay, did not amount to an election of the provisions of

the agreement. Her rights ought not to be cut off by a mere slip of that kind, when the law gave her a year to determine. The facts in the case do not warrant the conclusion that the plaintiff is bound by the transfer under the contract, nor the rent collected; but, on the contrary, she still had the right of election. *Beem v. Kimberly,* 72 Wis. 343, 39 N. W. 542; *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571; *Green Bay & M. C. Co. v. Hewitt,* 62 Wis. 316, 21 N. W. 216, 22 N. W. 588; *Wis. M. & F. Ins. Co. Bank v. Mann,* 100 Wis. 596, 76 N. W. 777; *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1. Nor was any ground of estoppel shown. The estate in no way changed its position because of any act of plaintiff in allowing the deed to be recorded or in receiving rents. As said by this court in *McDougald v. New Richmond R. M. Co.* 125 Wis. 121, at page 132 (103 N. W. 244, 248):

"One of the prime essentials to using equity jurisdiction to estop one because of his conduct from insisting upon his legal rights as to another, is a change of position by such other, reasonably relying upon such conduct so that he would be prejudiced if a change of attitude upon the part of that one were given effect." *Likens v. Likens,* 136 Wis. 321, 117 N. W. 799.

The court below found upon sufficient evidence that there was no laches on the part of plaintiff in the matter of filing her election.

It is contended by counsel for appellant that any other construction of the statutes than that the assent to the agreement must be in writing and before marriage would open the door to fraud, while on the part of respondent it is said that no fraud appears in this case, and that no harm will be done by enforcing the oral agreement made before marriage and reduced to writing afterwards, because all the terms were well understood and agreed upon. The difficulty with this argument is that courts have no power to disregard the plain mandate of a valid statute merely because in some cases it may work hardship. The policy of the statute is a legis-

lative and not a judicial one. If it were necessary to inquire into the wisdom of the legislature in passing the statute, many cogent reasons might be found in favor of its strict enforcement.

It follows from what has been said that the oral antenuptial agreement was void, and that the contract made after marriage, though reciting the prior oral one, simply amounted to a postnuptial contract, that the plaintiff was not guilty of laches, nor was she estopped from making her election, and therefore the judgment below must be reversed.

By the Court.—The judgment is reversed, and the cause remanded with directions to the circuit court to reverse the judgment of the county court, and for further proceedings according to law.

STATE EX REL. VAN ALSTINE, Appellant, vs. FREAR, Secretary of State, and another, Respondents.

February 25—April 5, 1910.

Constitutional law: Delegation of legislative power: Statutes: Referendum: Stare decisis: *General and local laws: Publication after vote of people: "Approval:" Primary elections: Nominations for office: Political conventions: Abridging right of assemblage: Elections: Official ballots: Regulation: Discrimination between candidates: Voting for candidate of other party: Qualifications for office: Declaration of candidate: Election of U. S. senator: Primary nominations advisory only.*

1. Except as authorized by the constitution the legislature cannot delegate power to make a law.
2. The legislature may, however, make a law to become operative on the happening of a certain contingency or on the ascertainment of a fact upon which the law makes or intends to make its own action depend.
3. A decision on a constitutional question that has long been considered the settled law of the state should not be lightly set aside,

though the court as presently constituted might reach a different conclusion if the question were a new one.

4. The question whether or not a general law shall become operative may be referred by the legislature to a vote of the electors of the state. Such reference does not involve any delegation of power to make a law. *Smith v. Janesville*, 26 Wis. 291, followed. MARSHALL, J., concurs on the ground of *stare decisis* only.

5. As to the right of referendum, no distinction between local and general laws is recognized in our constitution, and there is no difference in principle. MARSHALL, J., dissents.

6. Ch. 451, Laws of 1903, which declared that the provisions thereof relating to primary elections should go into effect only after being approved or ratified by the people of the state at the next general election, was a complete law when it received the executive sanction and was published in the official state paper; and publication thereof after it had been ratified by the popular vote was not essential.

7. In sec. 329, Stats. (1898), providing that all general laws shall be published immediately after their passage and approval, the word "approval" refers to executive approval.

8. Ch. 451, Laws of 1903, providing for primary elections to nominate party candidates for office, and denying the right of the nominees of conventions, as such, to a place on the official ballot, does not abridge "the right of the people peaceably to assemble, to consult for the common good," guaranteed by sec. 4, art. I, Const.

9. The legislature has power to prescribe reasonable regulations governing the manner in which names may be placed on the official ballot, printed and distributed at public expense.

10. The fact that a person nominated for an office by nomination papers, as provided in secs. 30–32, Stats. (1898), may have as many signatures to his petition as he can get, while a candidate for nomination on a party ticket to be voted for at a primary election, under ch. 451, Laws of 1903, is restricted as to the number of signatures he may procure, does not show such a discrimination against the candidate at the primary as renders the act of 1903 invalid, the conditions and the circumstances applicable thereto being different in the two cases.

11. Legislation on the subject of elections is within the power of the legislature so long as it merely regulates the exercise of the elective franchise and does not deny the franchise itself either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial.

12. The fact that under ch. 451, Laws of 1903, the members of one political party may vote at the primaries for candidates of a different party, does not render the law invalid.
13. The requirement in ch. 451, Laws of 1903, that each candidate to be voted for at the primary shall file a declaration that he will qualify for the office if nominated and elected, does not render the act invalid as prescribing a qualification for office additional to those required by the constitution.
14. The provisions in ch. 451, Laws of 1903, for the nomination at primary elections of party candidates for the office of United States senator do not impose any legal obligation upon any member of the legislature to vote for his party nominee or restrict the choice to persons who were voted for at the primary, and do not forbid the members of the legislature from making nominations or prevent the holding of caucuses for that purpose, but merely afford an opportunity for the people to express their preference and for the legislators to become advised as to public sentiment, and hence do not contravene the federal constitution or the federal statutes respecting the election of United States senators.
15. The action of the electors in nominating, at the primary, candidates for the office of United States senator, amounts to nothing more than an exercise of the right of petition.

APPEAL from an order of the circuit court for Dane county: MARTIN L. LUECK, Judge. *Affirmed.*

For the appellants there were briefs by *J. Elmer Lehr* and *Charles F. Lamb,* attorneys, and *C. F. Lamb,* of counsel, and a supplemental and reply brief by *J. Elmer Lehr* and *C. F. Lamb,* attorneys, and *Thomas M. Kearney* and *J. Elmer Lehr,* of counsel; and the cause was argued orally by *C. F. Lamb, J. Elmer Lehr,* and *W. D. Thompson.*

The *Attorney General* and *Russell Jackson,* deputy attorney general, for the respondent.

The following opinion was filed April 5, 1910:

BARNES, J. This is a taxpayer's action, brought to enjoin the secretary of state from preparing and transmitting to the several county, town, city, or village clerks of the state of Wisconsin notices designating the offices for which can-

didates are to be nominated at the primary election, as required by ch. 451, Laws of 1903, to be held in September, 1910, and from performing all other acts required by him to be performed by said chapter, and from auditing any claims or accounts for expenses arising out of any acts required to be performed under said chapter, and from drawing any warrant or order upon the state treasurer in payment thereof, and also enjoining the state treasurer from paying any warrant or order drawn on him because of any expense incurred under the aforesaid chapter. The relator appeals from an order sustaining a general demurrer to the complaint.

The validity of said ch. 451, popularly known as the "Primary Election Law," is assailed on five grounds: (1) Because the act in question has no validity unless it is in force and effect by virtue of legislative power delegated by the legislature to the voters of the state; (2) because the act in question is a general law and was never published after its final approval by the voters of the state; (3) because the act in question abridges the right of the people to assemble and consult for the common good; (4) because the act unlawfully and unreasonably limits the rights of candidates for office in securing support from voters and the rights of voters to participate in the selection of candidates for office; (5) because the act in question operates to coerce the judgment and discretion of the legislature in choosing United States senators, and unlawfully regulates the manner of choosing such senators, and operates to secure their election by popular vote.

1. Sec. 26 of said ch. 451 provides:

"The question whether the foregoing provisions of this act shall take effect and be in force shall be submitted to the people of this state, in the manner provided by law for the submission of an amendment to the constitution, at the next general election to be held in November, 1904. If approved by a majority of the votes cast upon that question, it shall go into effect and be in force from and after such ratification by the people; otherwise it shall not take effect or be in force."

Sec. 28 of the act provides:

"This act shall take effect and be in force from and after its passage and publication subject to all provisions herein contained for its submission to the people for their ratification or rejection."

Sec. 1 of art. IV of the constitution of Wisconsin provides: "The legislative power shall be vested in a senate and assembly."

It is argued that the legislative power involves not only the function to declare what the law shall be, but also the function to declare when it shall go into effect, and that both must be exercised before the law is complete, and both call for an exercise of judgment and discretion on the part of members of lawmaking bodies, and that legislative power can only be delegated to such bodies as the constitution permits it to be delegated to, and that such power must be delegated in the manner prescribed by the constitution.

If the premise is accurate that legislative power was attempted to be delegated to the people by ch. 451, then the conclusion that the law is void is supported by such an abundance of authority that the rule of *stare decisis* should be applied. Except as authorized by the constitution the legislature cannot delegate power to make a law. *Slinger v. Henneman,* 38 Wis. 504, 510; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 69, 65 N. W. 738; *In re North Milwaukee,* 93 Wis. 616, 621, 67 N. W. 1033; *State ex rel. Adams v. Burdge,* 95 Wis. 390, 70 N. W. 347; *State ex rel. Boycott v. Mayor, etc.* 107 Wis. 654, 658, 84 N. W. 242; *Borgman v. Antigo,* 120 Wis. 296, 97 N. W. 936; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 515, 107 N. W. 500; *Nash v. Fries,* 129 Wis. 120, 108 N. W. 210; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 162, 172, 116 N. W. 905; *State ex rel. Williams v. Sawyer Co.* 140 Wis. 634, 123 N. W. 248.

It is just as well settled that, while the legislature may

not delegate its power to make a law, it can make a law to become operative on the happening of a certain contingency or on the ascertainment of a fact upon which the law makes or intends to make its own action depend. *In re Griner,* 16 Wis. 423; *State ex rel. Att'y Gen. v. O'Neill,* 24 Wis. 149; *Smith v. Janesville,* 26 Wis. 291; *Dowling v. Lancashire Ins. Co., supra; In re North Milwaukee, supra; State ex rel. Adams v. Burdge, supra; Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869; *Nash v. Fries, supra; State ex rel. Faber v. Hinkel,* 131 Wis. 103, 111 N. W. 217; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm., supra.* The authorities elsewhere adopting the same doctrine are so numerous that it may be said they are practically unanimous.

Therefore, the question arising under sec. 1 of art. IV of the constitution is, Did ch. 451, Laws of 1903, delegate to the electors of the state the power to make that law, or was the act a complete law in itself when it received the executive sanction and was published, and which was to become operative only on the happening of a future contingency, to wit, its approval by a majority of the electorate voting on the question? The courts have very properly refrained from attempting to promulgate any general rule as to what is or what is not a proper contingency upon which the operation of a law may be made to depend. Concrete cases have been passed upon as they have arisen, and a reference to most of the cases upon the point in this court, as well as some others, with a brief statement of the contingency involved, will be found in *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm., supra.*

In support of the contention that the legislature sought to confer legislative power on the electorate, and did not enact a law that was to become effective on the happening of a contingency, it is urged that the constitution provides that certain questions may or must be submitted to the voters of the state (secs. 1, 2, art. XII; sec. 5, art. XI; sec. 22, art. IV;

secs. 7, 8, art. XIII); that this express delegation of the power of submission excludes any other or further power to submit; and that an election is not a future contingency upon which the operation of a law may be made to depend.

This court, in *State ex rel. Att'y Gen. v. O'Neill,* 24 Wis. 149, held that the question as to whether a local law should become operative might properly be submitted to a vote of the people.

In *Smith v. Janesville,* 26 Wis. 291, it was held that there was no difference in principle in this regard between a general and a local law, and that the result of an election was one of those future contingent events upon which a general law might be made to take effect.

It is not contended that the *O'Neill Case* was not correctly decided, or that the opinion of the court in *Smith v. Janesville* does not fully meet the attack on the law which is under present consideration. It is contended, however, that there is a well-recognized distinction between the right of legislative bodies to submit local measures for approval to the voters of the particular locality that is to be affected thereby and the right to submit general acts for approval to the voters of the state. Furthermore, that the decision in *Smith v. Janesville* is not in harmony with that of any other court in the country; that it has been subsequently overruled; and that, as a matter of fact, the law under consideration in that case, being an amendment to the banking law, was properly and necessarily submitted to the voters, and that, while the decision was placed on a wrong ground, it was right in fact, and the false reasons given for the decision should be treated as mere *dictum.*

It is also urged that the rule of *stare decisis* should not be applied because the decision in *Smith v. Janesville* is wrong in principle and contrary to the uniform current of judicial decision elsewhere, and because the case has been subsequently overruled.

Decisions on constitutional questions that have long been considered the settled law of the state should not be lightly set aside, although this court as presently constituted might reach a different conclusion if the proposition were an original one. As is said in *Fisher v. Horicon Iron & Mfg. Co.* 10 Wis. 351, 355:

"It is the duty of this branch of the government to pass finally upon the construction of a law, and determine whether the legislature in its action has transcended its constitutional limits, and the community has a right to expect, with confidence, we will adhere to decisions made after full argument and upon due consideration."

It is true that property rights have not grown up under the decision in question. It is also true that the legislature had the right to assume, when it enacted ch. 451, Laws of 1903, that it was a settled principle of constitutional law in Wisconsin that the question whether or not a general law should become operative might be referred to a vote of the electors of the state. This court had so declared in express terms in the *Janesville Case* more than thirty years before the law now challenged had been enacted, and that decision was subsequently cited with apparent approval in many cases, and no criticism of it had ever been indulged in. If it has been overruled, it has been by implication. The legislature must of necessity take the decisions of this court for its guidance on questions of constitutional law. When it has done so, the court should not hold that it pinned its faith to a shadow, unless some doctrine vicious in principle or fraught with grave consequences has been enunciated. It is from this standpoint and with this attitude that the court should approach the first question raised by the appellant, which is the one that was argued at the greatest length orally and in the briefs, and apparently the one most relied on for a reversal of the order in this case.

If a law like the one under consideration does in fact con-

fer or attempt to confer legislative power on the electors of the state, then the decision in *Smith v. Janesville* has been overruled by implication by the subsequently decided cases which have been cited. But the decision in the *Janesville Case* is not in any sense based upon the proposition that any such power was in fact conferred. On the contrary, it is grounded upon the proposition that the act was a completed piece of legislation when passed by the legislature and was a complete law when signed by the governor, but nevertheless a law which would not become operative unless a future contingency happened, to wit, that it received the sanction of a majority of the popular vote. In no case subsequently decided in this court has there been a suggestion or expression of doubt that the result of such a vote was not a contingency upon which a law might or might not be made to go into operation. On the contrary, the decision seems to have been approved in a number of cases subsequently decided by this court. In *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 69, 65 N. W. 738, the court, speaking of the power of the legislature to make the effectiveness of a law dependent upon a future contingency, said:

"And accordingly the time when the act shall take effect may be made to depend upon the majority of a popular vote being cast in its favor under a submission to the electors for that purpose, provided in the act,"—citing the *O'Neill* and *Janesville Cases.*

The *North Milwaukee Case* (93 Wis. 616, 621, 622, 67 N. W. 1033) is relied on as one that overrules *Smith v. Janesville.* On the contrary, that decision is there approved. The court, recognizing the rule that a law might become effective on the happening of some future event, said:

"Such laws as these are very frequent, and, in fact, they are sometimes absolutely necessary to accomplish the best purposes of legislation. Such laws were considered, and their validity affirmed, by this court in *State ex rel. Att'y Gen. v. O'Neill,* 24 Wis. 149. See, also, *Smith v. Janesville,* 26 Wis. 291."

In *Adams v. Beloit,* 105 Wis. 363, 369, 81 N. W. 869, 870, the court said:

"A law otherwise unobjectionable is not invalid simply because power is given to some local officials or body of electors to determine the existence of a fact upon which it shall go into effect in the given locality, if the law itself is a complete law upon the statute books. This is not the delegation of power to make a law, but simply the delegation of power to determine or ascertain some fact upon which the action of the law which is complete in itself is to depend."

In support of what is quoted the cases of *State ex rel. Att'y Gen. v. O'Neill* and *Smith v. Janesville* are cited.

Again, secs. 1548 and 1550 of the excise law (R. S. 1878) were amended by ch. 296, Laws of 1885, so as to empower the electors of the several towns, cities, and villages in the state to determine within certain fixed limitations the amount of a license fee to be exacted therein. It was contended that this act attempted to confer legislative power on the electors. This court, in *State ex rel. Faber v. Hinkel,* 131 Wis. 103, 108, 111 N. W. 217, 219, said:

"The people at such election were not empowered to legislate, but create or declare the fact upon which became effective the behest of the legislature that the sum to be charged for a license shall be $350 to $500, according to such fact. Such behest was a general law."

The cases of *State ex rel. Att'y Gen. v. O'Neill* and *Smith v. Janesville,* among others, are again cited in support of the rule enunciated. And in the *Railroad Commission Case,* 136 Wis. 146, 163, 116 N. W. 905, 911, this court quoted with approval the following language from *State v. Parker,* 26 Vt. 357, upon which the decisions in *State ex rel. Att'y Gen. v. O'Neill* and *Smith v. Janesville* were really based:

"It makes no essential difference what is the nature of the contingency, so it be an equal and a fair one, a moral and a legal one, not opposed to sound policy, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one."

It is obvious, therefore, that the decision in *Smith v. Janesville* is not a neglected or despised waif in the sea of judicial decisions, but is one that has never been doubted nor criticised by the court that promulgated it, and one that has been frequently cited as authority and referred to with approval. Indeed, the laws involved in *State ex rel. Faber v. Hinkel, supra,* and *State ex rel. Williams v. Sawyer Co.* 140 Wis. 634, 123 N. W. 248, were general laws applicable to the entire state, although the different local political entities therein might adopt or reject their provisions.

The case of *Smith v. Janesville* involved the constitutionality of ch. 102, Laws of 1866, which amended sec. 20, ch. 71, R. S. 1858, entitled "Of the Incorporation of Banking Associations." Sec. 53 of ch. 71, R. S. 1858, provided that the act might be amended by any future legislature, but that no amendment thereto should have any force or effect until submitted to a vote of the electors and approved by them. As the constitution then was, the legislature was prohibited from enacting any general or special law on the subject of banking, but might propose a law on the subject and submit it to a vote of the electors. Secs. 4, 5, art. XI, Const. The provision for the taxation of state banks was embodied in the general banking law contained in ch. 71, R. S. 1858, which had been approved by the people. Ch. 102, Laws of 1866, materially modified this method of taxation, and it is argued that it was an amendment to the general banking law and was therefore necessarily submitted to a vote of the people; that the court should have sustained the referendum feature of the law on this ground; that the court reached a correct conclusion by an untenable process of reasoning; and that in such a situation the reasoning on which the decision is based should be rejected as *dictum*.

This is not a correct view of the situation that confronted the court in the *Janesville Case*. The attack in that case was directed to the part of said ch. 102 which provided for

the taxation of national banks. As to those corporations the state had neither the power to create nor to regulate them, and the constitutional provisions quoted could not affect them either directly or remotely. By sec. 41 of ch. 106 of the act of Congress of June 3, 1864 (13 U. S. Stats. at Large, 111), the states were empowered to tax the capital stock of national banks in the manner therein provided. State legislation was necessary in order to tax these institutions in the manner authorized. Manifestly laws to that end should be passed in the same way that other general taxation laws were passed. There was nothing connected with the subject of taxing national banks that required a law pertaining thereto to be submitted to a vote of the people. It was not necessary that such an act should be combined with one providing for the taxation of state banks. A reference to the briefs shows that the contention of counsel in the *Janesville Case* was that, while it might be proper enough to refer so much of the law as pertained to the taxation of state banks to a popular vote, there was no authority whatever for referring that part of the law relating to the taxation of national banks, and that therefore the act had no force or effect as to such banks. The decision of the court meets this argument by saying, in effect, that a referendum on any general law is constitutional because the power to make the law is not thereby delegated to the electors. We see no escape from the proposition that the *Janesville Case* properly raised and presented to the court every question that is there decided. It seems to us that the law under consideration, in so far as it applied to national banks, was sustained on the only ground upon which it could be sustained, and that no part of that decision can be considered as mere *dictum.*

The decision in *Smith v. Janesville* follows *State ex rel. Att'y Gen. v. O'Neill,* 24 Wis. 149, although the latter case involved the right of the legislature to refer a law local in character to the electorate. It is said in the *O'Neill Case,*

however, that there is no difference in principle in this regard between a local and a general law, and this view is approved in the later case. Counsel for the appellant concede that the ultimate conclusion reached in the *O'Neill Case* was correct, and that as to matters purely local or municipal the legislature may enact conditional laws and refer it to the people locally to decide whether such laws shall become effective in the municipalities in which they reside, and the following cases are cited as so holding: *Slinger v. Henneman,* 38 Wis. 504; *Ryan v. Outagamie Co.* 80 Wis. 336, 50 N. W. 340; *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869; *State ex rel. Faber v. Hinkel,* 131 Wis. 103, 111 N. W. 217; *State ex rel. Boycott v. Mayor, etc.* 107 Wis. 654, 84 N. W. 242; *Borgman v. Antigo,* 120 Wis. 296, 97 N. W. 936. The general current of authority elsewhere is to the same effect, although, aside from Wisconsin, the cases hold that a general law, using that term in its broad sense, may not be referred. See cases cited 10 Cent. Dig. 1392.

We think this court was right in saying, in *State ex rel. Att'y Gen. v. O'Neill* and in *Smith v. Janesville,* that no good reason existed for applying a different rule to a local law than that applicable to one not local. The constitution nowhere expressly recognizes any such distinction, and it is difficult to see how it does so by implication. Sec. 22 of art. IV empowers the legislature to confer on boards of supervisors powers of a local legislative character. But this provision is entirely silent as to the right of the legislature to confer on the electors of a county the power to say whether a law shall become operative or not, regardless of whether such law is made directly by the legislature or by a county board by virtue of authority delegated to it. Sec. 3 of art. XI makes it the duty of the legislature to provide for the organization of incorporated cities and villages. This provision carries no suggestion or legitimate inference to the effect

that the legislature in carrying out its provisions may delegate to the voters of the municipality the right to say whether or not the provisions of a law shall become operative within its boundaries. Aside from the two provisions referred to, we do not find any clause in the constitution that could reasonably be interpreted as recognizing the distinction between the two classes of laws that seems to have been generally recognized by other courts. If a difference exists it must exist by virtue of the organic law and not because the court may think that the framers of the law would have acted more wisely had they recognized the distinction and provided for it. Courts cannot supply what they deem to be unwise omissions from the constitution.

In reference to the distinction between the right of referendum as to local and general laws, Judge Cooley asks these pertinent questions, which are not answered by the cases in those courts which recognize such distinction:

"May not any law framed for the state at large be made conditional on an acceptance by the people at large, declared through the ballot-box? If it is not unconstitutional to delegate to a single locality the power to decide whether it will be governed by a particular charter, must it not quite as clearly be within the power of the legislature to refer to the people at large, from whom all power is derived, the decision upon any proposed statute affecting the whole state? And can that be called a delegation of power which consists only in the agent or trustee referring back to the principal the final decision in a case where the principal is the party concerned, and where perhaps there are questions of policy and property involved which no authority can decide so satisfactorily and so conclusively as the principal to whom they are referred?" Cooley, Const. Lim. (7th ed.) 168.

Nor can we concur in the views of some courts that the approval of the referendum principle will tend to make legislators shirk responsibility and become cowardly and corrupt. By indulging in flights of imagination we can often picture

grave consequences resulting from apparently harmless and innocent acts. Courts cannot presume that legislative power will be abused, nor that legislators, otherwise inclined to be honest and fearless, will become craven and dishonest simply because the right of referendum is upheld; and we should not approach the important matter of interpreting our constitution with the assumption that corruption is rampant and that trust and confidence may not safely be reposed in coordinate branches of the government. If officials in high places prove recreant to the trusts reposed in them, the remedy lies in another direction.

It frequently happens that laws are proposed which involve a radical departure from the existing order of things. The wisdom of the proposed innovation may be a matter of well-grounded doubt, and the enactment of the law may be a matter of grave concern to the public. A law when enacted affects the people of the state, and not merely the lawmakers who made it. Members of the legislature simply act as servants and representatives of the people who elect them. These representatives are chosen in a democracy because it is impracticable for the people to assemble and make their own laws. Under our form of government the majority may not always be right, but it must of necessity rule. The majority of the people is as apt to be right as is the majority of the legislature. Where, in a doubtful case, there is any impropriety in the agent's consulting the wishes of his principal upon questions of general public policy is not readily perceivable. If the act which the agent proposes doing is detrimental to the best interests of the state, it is the principal who suffers in consequence thereof. Wherein serious harm will result by securing an expression of opinion from the principal is not apparent. No consideration of sufficient moment is suggested to warrant a departure from the decision in *Smith v. Janesville.*

2. It is next contended that ch. 451, Laws of 1903, never

became effective because the act was not published after the electors had voted to adopt it.

By sec. 21 of art. VII of the constitution it is provided: "The legislature shall provide by law for the speedy publication of all statute laws. . . . And no general law shall be in force until published."

Sec. 329, Stats. (1898), was enacted pursuant to the foregoing requirement, and provides that every general law shall be published in the official state paper before it becomes effective, and that such "publications shall be made immediately after the passage and approval of the said laws, under the direction and supervision of the secretary of state."

Sec. 28 of said ch. 451 provides that the act shall take effect and be in force from and after its passage and publication, subject to the provisions therein contained for submission to the people.

The act was signed by the governor on May 23, 1903, and was published on June 3d following. It was also published before its submission to the electors at the general election held in November, 1904.

If the act delegated legislative or executive power to the electors there would be great force in the objection raised to its publication. We have already said that it does not do so, but falls within the same category as other laws that become operative on the happening of some contingency, and that such an act is a complete law when it receives the executive sanction and is published, although it does not take effect presently. The approval referred to in said sec. 329, Stats. (1898), undoubtedly refers to executive approval. In view of the conclusions reached there is no more reason for saying that this act should have been published after it was ratified by the popular vote than there would be for saying that any other law which does not become effective except on the happening of a contingency must be published after the contingency arises in order to have vitality.

3. It is next urged that said ch. 451 violates sec. 4, art. I, of the constitution, which provides:

"The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

In support of this contention it is urged that, prior to the enactment of the law, delegates assembled in convention, nominated candidates for office, promulgated party platforms, and discussed measures pertaining to the general welfare; that they are now debarred from naming candidates or making party platforms, as heretofore, and to that extent their former privileges are abridged. Furthermore, that the right to name party candidates by convention was recognized before the constitution was adopted, and that not only should the constitutional right of assemblage be protected, but also the necessary incidents to such rights.

What the constitution guarantees is the right of assemblage and of consultation. Ch. 451 does not interfere with that right. The people or their delegates may now assemble, hold conventions, and consult as they did formerly. The law does provide that certain things which were done at conventions by delegates representing the people must now be done by the people themselves at an election, and that other things which were done by conventions must now be done by the candidates nominated for office. It would be rather far-fetched to say that, because some acts were performed by assemblages before the constitution was adopted, a perpetual right is guaranteed thereby that these particular acts must for all future time be performed in the same manner. In lieu of congregating at caucuses and selecting delegates to assemble and represent them, the voters may now assemble at the polls in the different polling places and consult and express their choice of candidates. There is no curtailment of the right guaranteed by the constitution. At best there is but a substitution of methods by which the selection of can-

didates is to be made. The right of any political party to assemble in convention and consult for the common good is unimpaired. Since the Australian ballot has been adopted and is printed and distributed at public expense, it is entirely proper for the legislature to prescribe reasonable regulations governing the manner in which names may be placed on that ballot.

The courts of Oregon and Louisiana hold that primary election laws like our own do not infringe upon the right to assemble and consult for the common good. *Ladd v. Holmes,* 40 Oreg. 167, 66 Pac. 714; *State ex rel. Labauve v. Michel,* 121 La. 374, 46 South. 430. Such rights have always been held to be subject to reasonable regulation. Cooley, Const. Law, 280; Freund, Police Power, § 480; Stimson, Fed. & State Const. 49. Our own court, in *State ex rel. Runge v. Anderson,* 100 Wis. 523, 533, 534, 76 N. W. 482, 486, used the following language, which is entirely appropriate and applicable to the question under discussion:

"Manifestly, the right to vote, the secrecy of the vote, and the purity of elections, all essential to the success of our form of government, cannot be secured without legislative regulations. Such regulations, within reasonable limits, strengthen and make effective the constitutional guaranties instead of impairing or destroying them. Some interference with freedom of action is permissible and necessarily incident to the power to regulate at all, as some interference with personal liberty is necessary and incident to government; and so far as legislative regulations are reasonable and bear on all persons equally so far as practicable in view of the constitutional end sought, they cannot rightfully be said to contravene any constitutional right."

The cases cited as sustaining the view that the right of assemblage and consultation is impaired by ch. 451 are *Britton v. Board of Elec. Comm'rs,* 129 Cal. 337, 61 Pac. 1115, and *State ex rel. Ragan v. Junkin,* 85 Neb. 1, 122 N. W. 473. Neither case is in point. The Nebraska law provided that

certain candidates should not be "nominated, indorsed, recommended, censured, criticised or referred to in any manner by any political party, or any political convention or primary, or at any primary election." It is obvious that this statute violated both the letter and the spirit of the constitutional provision under discussion. To say that a candidate who may be wholly unfit for office may not be "criticised or referred to in any manner" at a political convention, primary, or primary election is clearly a denial of the right of assemblage to consult for the common good.

The California case does not hold that, by denying to political conventions the right to nominate candidates and make party platforms, its constitution was violated. The California primary election law denied the right of a place on the primary ballot to any party that did not at the preceding election cast three per cent. of the total vote. It was this provision of the law that was held to contravene the constitutional guaranty of right of assemblage and consultation. Our act fixes one per cent. The Australian ballot law also requires that a party cast one per cent. of the total vote in order to entitle it to a place as a party on the election ballot. Sec. 30, Stats. (1898). This provision was held valid in *State ex rel. Runge v. Anderson, supra.* If valid as to a place on the election ballot, no good reason is apparent why it should not be valid as to the primary ballot.

It may be a debatable question whether or not primary elections are an improvement on the methods which they superseded. Many states have such laws, and no state having once committed itself to the primary principle seems to have as yet receded from it. If ch. 451 is a violation of sec. 4, art. I, of our constitution, on the grounds urged, then the state is irrevocably committed to the caucus and convention method of naming candidates and building party platforms until such time as the constitution is amended. It is highly improbable that our constitution makers intended that

any such result would follow from a provision practically taken from the English Bill of Rights, and which was framed to meet grave abuses of a very different character. Such intention would entirely ignore those altered conditions which the mutations of time bring about, and would be tantamount to an egotistical declaration that when the constitution was framed the millenium had arrived and progress had reached its ultimate goal. Unless we read something into the constitution which we do not find there, we are unable to see how the third objection to the law can be upheld.

4. It is next contended that ch. 451, Laws of 1903, violates the rule of uniformity guaranteed by the state and federal constitutions. Under this assignment of error it is argued (1) that a person nominated for an office by nomination papers, as provided in secs. 30–32, Stats. (1898), may secure all the signatures to his petition that he is able to secure, while a candidate for nomination on a party ticket to be voted for at the primary is restricted as to the number of signatures which he may procure and is therefore discriminated against; (2) that the primary law permits electors to vote for candidates for a party with which they do not affiliate and the nominees of which they have no intention of supporting at the election; (3) that the provision in the law, which requires a candidate to file with his nomination paper, or within five days thereafter, a declaration that he will qualify for the office if nominated and elected, is void because it prescribes a qualification for office additional to that required by the constitution.

We fail to see much force in the argument that there is any discrimination in favor of the candidate who secures a place on the election ballot by virtue of nomination papers and against the candidate who seeks to secure a place on such ballot as the nominee of some political party at the primary election. The one is seeking the nomination of his party, and, if successful, secures the manifest advantages that fol-

low therefrom; the other is a free lance, who usually depends on his individual efforts to secure his election. Unless we have similarity of conditions there is no discrimination. As between candidates at the primary election who seek party nominations there is no discrimination. Any person who desires to secure a place on the election ballot by means of nomination papers may resort to this method and secure all the signatures he is able to. There may have been, and doubtless were, considerations of sufficient gravity to lead the legislature to restrict the number of signatures that a candidate for a party nomination should secure. Some of these considerations are obvious and have no application to an independent candidate who is seeking an election to an office. It is difficult to see where the elector or the candidate is deprived of any substantial right or in fact any right. The nomination paper is signed so as to give the people an opportunity to vote for the nominee as the candidate of some specified party at the primary election. When the requisite number of signatures is secured for this purpose, the object for which nomination papers are circulated is accomplished, and the candidate is placed in a position where all the electors may vote for him if they choose. The electors are not deprived of any substantial right because they may not be able to sign a petition, since every object that could be gained by such action has already been accomplished. Since the adoption of the Australian ballot law political parties have been necessarily recognized by various statutes. The ballots are printed and distributed at public expense. The names of party nominees must be placed thereon. In order to do this there must be some authoritative way of determining who the party nominees are. This in turn renders it permissible at least for the legislature to make reasonable regulations as to how party nominations shall be made.

In *State ex rel. Ragan v. Junkin,* 85 Neb. 1, 122 N. W. 473, it was held that a law was void which restricted the

number of signatures which an independent candidate might secure to his nomination papers. The decision has little value as authority upon the question we are here considering. The clause of the Nebraska constitution to which the court held that the law was inimical is not found in our constitution, and neither does it contain any provision of like tenor and effect. Furthermore, it was held that, under and because of the peculiar restrictions of the Nebraska law, a candidate might be deprived of the right to have his name placed upon the official ballot. This presents a very different situation from that presented where the candidate has more than a sufficient number of signers to entitle him to a place on the primary ballot so that all may vote for him who desire. The restriction on the right of the candidate and of the elector, contained in the primary election law, is by no means as serious or substantial as are certain restrictions pertaining to the Australian ballot law which have been sustained. *State ex rel. Runge v. Anderson,* 100 Wis. 523, 76 N. W. 482; *De Walt v. Bartley,* 146 Pa. St. 529, 543, 24 Atl. 185; *Independence Party Nomination,* 208 Pa. St. 108, 112, 57 Atl. 344; *Oughton v. Black,* 212 Pa. St. 1, 61 Atl. 346; *Miner v. Olin,* 159 Mass. 487, 34 N. E. 721; *Cole v. Tucker,* 164 Mass. 486, 41 N. E. 681; *Comm. v. Rogers,* 181 Mass. 184, 187, 63 N. E. 421; *State ex rel. Zent v. Nichols,* 50 Wash. 508, 97 Pac. 728. These decisions establish the rule that legislation on the subject of elections is within the constitutional power of the legislature so long as it merely regulates the exercise of the elective franchise and does not deny the franchise itself either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial.

The second objection urged under the fourth assignment of error is that the primary election law permits a voter, without regard to party affiliations, to vote at a primary election for candidates of any party he chooses to select, whether he is a member of that party or not or whether he ever intends

to become such, and thus provides for their opponents an opportunity for disrupting and destroying political parties through the selection of improper candidates.

It is true that members of one political party may vote at the primaries for candidates of a different political persuasion. That this has been done, or will be done in the future, to any greater extent under the primary election law than was practiced under the caucus system that existed before the adoption of the primary law, may well be doubted. That any considerable following of one political creed will deliberately desert their own party at the primary to foist an unworthy set of candidates on a rival party presupposes a degree of moral turpitude that we cannot presume to exist. The rule of ethics which prompts members of one political persuasion to dictate the candidates or the policy of another may not be commendable, but we agree with the supreme court of Washington that the objection is political rather than judicial and should be remedied by the legislature instead of by the courts. *State ex rel. Zent v. Nichols, supra.* The law certainly presents an anomalous situation in this regard, if the legislature considered it important that party integrity should be preserved.

The contention that to require a candidate to declare that if nominated and elected to an office he will qualify adds a qualification not required by the constitution, we regard as untenable. It is hardly making a qualification to require a man to say that if the people see fit to nominate and elect him he will serve. The electors have the right to know whether he will or not; otherwise, if he should decline, their votes would be thrown away. They ought to have the right to express a choice as between candidates who are willing to assume the duties of office if elected. The case of *Dapper v. Smith,* 138 Mich. 104, 101 N. W. 60, cited by appellant, arose under a very different statute from the one we are considering, although some language is used in the opinion by

way of argument which is not inapplicable to the situation before us. The Michigan law required that, before the name of any candidate for office was placed on the ballot to be used at a primary election, the candidate should on oath declare his purpose to become such. Sec. 1 of art. XVIII of the Michigan constitution prescribes the oath which shall be required of public officers, and further provides that no other oath, declaration, or test shall be required as a qualification for any office or public trust. It was held that the statute violated the constitution by imposing an additional oath, and therefore an additional qualification, on the candidate to that required by the constitution. Our statute does not require an oath, and we have no such negative provision in our constitution as is contained in that of Michigan, except that no religious test shall ever be required as a qualification for office.

5. Lastly, it is contended that the law under consideration is void because it provides for the nomination of party candidates for the office of United States senator at the primary election.

Sec. 3 of art. I, Const. U. S., provides that senators shall be chosen by the state legislatures. Sec. 4 of the same article permits the various states to prescribe the times, places, and manner of holding elections for United States senators, but authorizes Congress to make or alter such regulation. Congress has legislated very fully upon the subject, as will be seen by a reference to secs. 14 to 19, R. S. of U. S. (U. S. Comp. Stats. 1901, pp. 7, 8). Such legislation supersedes any state legislation covering the same subject matter. *Patterson v. Belford,* Ellsw. Elec. Cas. 52; *Turney v. Marshall,* 1 Bartl. Elec. Cas. 167.

It is argued that said ch. 451 contravenes both the provisions of the federal constitution and of the federal statutes referred to, in that it, in effect, provides for an election of United States senators by popular vote.

The purpose of incorporating sec. 3 of art. I in our national constitution is apparent from a reading of the clause. If there were any doubt upon the subject a recurrence to the debates in the constitutional convention would remove it. It was written into our organic law through fear of popular government in its broadest sense, and because it was thought that the state legislatures would be more competent to select a desirable class of senators than would the people. However we may presently view the fear alluded to, it was not an unnatural one 123 years ago when the foundations of a government were being laid that approached measurably nearer a true democracy than did any other then in existence or that had been for centuries. As careful men engaged in an experimental undertaking of great moment, the framers of the constitution cautiously sought to avoid the dangers that loomed up on the horizon of their perspective into the future, and the excesses of so-called popular government in France a few years later would lend support to the view that the fears indulged in were not wholly chimerical. Indeed, both before and since the adoption of our constitution, history has been replete with examples of that true Jedwood justice meted out by the populace where the accusation and conviction were simultaneous and preceded the investigation if it were even considered worth while to make one. The constitution, and the first ten amendments thereto adopted as early as 1791, show a well-defined purpose to protect the right of the individual against tyrannical and arbitrary government. That governments of and by the people, as well as despotisms, might become arbitrary seems to have been taken for granted. In free England attainder on conviction of a crime with corruption of blood was abolished only by the statute of 33 and 34 Vict. During and after the Revolution, acts of attainder were passed in several of the American states. 1 Bouv. Law Dict. 190. So it was feared, with reasonable apprehension, that in times of excitement and tumult when passions were

aroused, the populace, acting through representatives directly chosen by the electors, might indulge in a riot of laws subversive of private rights. To secure a house of Congress not so remote from the people as to be unaccountable to them, and yet distant enough to be able to withstand popular outbreaks of passion and vindictiveness and assaults upon the rights of the citizen, was the problem which confronted the convention. Having first concluded that it was essential that such a body should be provided for, it was finally concluded that by giving senators a comparatively long term of office, by providing that but one third of the membership should be elected every two years, and further that the selection should be made by the people's representatives in the state legislatures instead of by the people themselves, the desired end could be attained. Widely variant views were entertained on the subject. Some delegates thought that the senators were being removed too far from the people; others that they were not being removed far enough. The clause as finally adopted, like most of the provisions of the federal constitution, was the result of a compromise, on which a middle ground between that occupied by the extremists on either side was agreed to. With the wisdom or unwisdom of this conclusion the courts are not concerned. It is their sworn duty to interpret the law as they find it; not to make it as they think it should be. It is better that bad laws be enforced than that courts should usurp the functions of the lawmaking power, and by inadmissible construction, or otherwise, defeat its will. If a constitutional provision was unwise in its inception or has become unsuited to our wants, there is a legitimate method provided by which it may be eliminated. If a legislative act is unwise or vicious it may be repealed, but for the courts to set up their own standards of what the law should be and to defeat our constitutions themselves, or laws which did not conflict with them, would be intolerable. While some of the constitutional restrictions

referred to may have operated to the detriment of the body politic at times, yet, when the evils they have prevented are weighed in the balance against those they have wrought, it would be a bold assertion to say that a single one of them was, or is, inimical to the public welfare, or that it has been a more potent agency in creating mischief than it has been in promoting good.

The constitution unequivocally vests in the legislatures of the several states the power to elect senators. This can only mean that it is made the duty of the legislators to meet, consult, and exercise their conscientious judgments in making a choice, having in mind always that they are the agents and representatives of those who sent them and that the wishes of the people are entitled to grave consideration. But if it be the object and purpose of this law to shift the burden of, and the responsibility for, the election of United States senators from the legislature to the electorate; if our legislators are to play the parts of automatons and become mere passive instruments by and through whom the will of the voters is to be carried out; if to them is left the perfunctory duty of ratifying the action of the voters at the primaries, as the members of our electoral college confirm the result of a presidential election; if the electors in reality elect United States senators, instead of the legislature,—then the constitutional scheme has been superseded and the spirit of the constitution has been evaded and disregarded. Performing the empty ceremony of recording the wish of some other body is vitally different from expressing and recording independent thought and judgment.

But before we can convict the legislature of having abdicated its functions and of having violated the constitution in doing so, it is necessary to analyze what it has done. It is a settled principle of constitutional law that legislative acts should not be declared unconstitutional unless they clearly run counter to the letter or the spirit of some provision of

our constitutions. It is just as well settled that, if a legislative act is reasonably susceptible of two constructions, one of which would render the act void and the other valid, it is the duty of the courts to adopt the one which does not destroy the act. This is a reasonable rule, because it is not to be presumed that a co-ordinate department of the government intended to violate the state or national constitution. The provisions of ch. 451, Laws of 1903, pertaining to the election of United States senators are few and easily understood.

Subd. 3 of sec. 2 provides that party candidates for the office of United States senator shall be nominated in the manner provided therein for the nomination of candidates for state offices.

Subd. 1 of sec. 6 provides that nomination papers for candidates for the office of United States senator shall be filed in the office of the secretary of state.

Subd. 1 of sec. 18 provides that the person receiving the greatest number of votes at the primary as the candidate of the party for the office voted for shall be the candidate of that party for such office.

Subd. 2 of sec. 18 requires the secretary of state to publish in the official state paper a statement of the result of the canvass of the primary as soon as the same is certified to him.

The foregoing excerpts embody all the requirements found in the law that pertain to United States senators. Not a word is said in the act about requiring legislative candidates to pledge themselves to support the nominee of the party. The law in terms imposes no duty upon any member of the legislature to vote for any person who was a candidate before the primary. Neither does it restrict the choice to some person who was voted for thereat. Should this court assume that the coercive power of a nomination for senator at the primaries is so great as to destroy volition on the part of members of the legislature and convert them into mere voting machines? The first and only election of a senator

since the primary law was passed would indicate that very many members of the legislature did not so interpret the law, and we have little reason to suppose that any of them did. Certainly, the fact that a majority finally voted for the nominee of the primary proves nothing. The same result might have followed if no primary had been held.

The law on its face does not convey the impression that it contains a sinister assault upon sec. 3 of art. I of the federal constitution. On the contrary, the purpose of the provision relating to the nomination of United States senators may not only be lawful but may be entirely praiseworthy. Formerly political conventions met principally for the purpose of nominating candidates and promulgating party platforms. These functions are now performed at the primaries and by the candidates nominated thereat. While conventions may still be held, the necessity for holding them has largely been obviated, and it was no doubt thought by the legislature that they would be of infrequent occurrence. Such conventions, when held, very often expressed a choice of candidates for the senatorship. Senatorial and assembly conventions usually passed resolutions requesting their nominees to use all honorable means to secure the election of a favorite candidate. They furnished the only available means by which a candidate might become advised of the wishes of his constituency on this important subject. It is not only permissible, but is proper, that he should receive such advice. That advice can now be conveyed most effectively through the vote at the primary.

It should always be borne in mind that the people are the masters and that the members of the legislature are their servants, and that the agent should always give due consideration to the voice of the principal. In order to regard it he must hear it. It is none the less true that the agent, by his oath of office, swears that he will defend the constitutions, state and federal, and perform the duties of his office to the

best of his ability, and when *vox populi* points in one direction and our organic laws in the other, we must assume that the agent will courageously obey the behest of his oath and his conscience. It is not apparent how our primary law can be held to be so coercive as to destroy judgment and discretion on the part of a member of our legislature when he comes to perform the duty of electing a United States senator. Where the majority for some candidate is large, great deference should and no doubt will be accorded to its voice. When public sentiment does not materially preponderate in favor of a single candidate, it may have a comparatively slight influence in inducing a legislator to cast his vote in favor of a candidate who has received a bare plurality of the popular vote; and where the vote of the constituency of the individual member is decidedly adverse to the successful candidate, it may well have a tendency to lead him to oppose rather than support the nominee.

Our constitutions, state and national, guarantee the right of petition. Every citizen of the state has the right to petition the legislature asking that the candidate of his choice be elected United States senator. Every citizen of a senatorial or assembly district has the right to petition his local representative to the same effect. The lawmaker is thus advised of public sentiment, a potent factor for him to consider in connection with other matters in arriving at a conclusion. Wherein does the primary nomination for United States senators differ from the exercise of the right of petition? The legislative candidate is thereby informed of something that he has the right to know and of something that it is his duty to heed. He may not regard the verdict at the polls as obligatory, but should treat it as advisory. Moral suasion may be a perfectly legitimate agency to employ even in the election of a United States senator. That the electors in the exercise of their guaranteed right of petition might do in substance and effect what they now do at the primaries hardly

admits of controversy. The framers of the constitution could not have supposed that there was any impropriety in the people advising their representatives of how they desired them to vote on the senatorship, else an exception would have been incorporated in the clause guaranteeing the right of petition, restricting its application to matters other than the election of United States senators.

As is said in *State ex rel. McCue v. Blaisdell* (N. Dak.) 118 N. W. 141, the action of the electors in reference to a candidate for United States senator "amounts to nothing more than the right of petition, a right which they cannot be denied." The North Dakota law involved in this case contained a provision requiring nominees for the state legislature to sign a pledge to vote for the candidate of their party who received the nomination at the primary for the office of United States senator. This provision was held to be unconstitutional and void, because it was an attempt to coerce the members of the legislature to abdicate their right to use their individual judgments in making a selection, but it was also held that such void provision did not affect the remainder of the act.

Authorities elsewhere on the point under consideration are not numerous, but such as we have are to the effect that a law such as ours, providing for the nomination of candidates for the office of United States senator at a primary election, is valid. *State ex rel. McCue v. Blaisdell, supra,* and *State ex rel. Labauve v. Michel,* 121 La. 374, 46 South. 430. We do not wish to be understood as indorsing all that is said in the opinions in these cases, but do coincide with the conclusions reached to the extent here indicated.

A word might be said as to the contention that the legislature is deprived by this act of the power to make nominations for the office of United States senator. It may be conceded that the power to elect implies the power to nominate. But there is nothing in the act which forbids the members

of the legislature making nominations or even prevents the holding of party caucuses.

Construing the law as imposing no legal obligation on the part of any member of the legislature to vote for his party nominee at the primary, we must assume that the legislators will vote according to their consciences and convictions, giving due weight to the advisory vote of the people, and that therefore neither the letter nor the spirit of the constitution has been transgressed.

By the Court.—Order affirmed.

The following opinion was filed April 5, 1910:

MARSHALL, J. I concur with much reluctance in the decision that our constitution permits general laws to be made by the referendum method. I concur on the ground of *stare decisis,* only, the court having taken the position, now followed, over forty years ago and not since departed therefrom.

I concur in the decision that the primary election law does not violate the Bill of Rights because it not only does not prohibit the holding of political conventions or declarations thereat of party principles, but rather contemplates such action, nor does it prohibit the suggestion of candidates as before, subject to approval at the primary. In short, in practical effect it does not prohibit the doing of those things formerly done, and supposed to be necessary, to insure party success, but the right to assemble in conventions, to declare party principles and suggest candidates is permissible. It is not only not illegal nor against public morals, but is lawful and commendable as ever.

I concur in the decision that the act as to nominating candidates for United States senator is valid for the reasons stated in the court's opinion, which, in short, I understand to be that the act leaves the members of the legislature as free as

formerly to exercise their judgment upon such evidence as they can obtain; that under the act, as before the act, it is not only their right but it is their duty to exercise their own judgment, and not to act as mere agents to carry out the judgment of others; that the act creates neither a legal duty nor moral obligation to carry out the verdict at the primary, except as it coincides with their deliberate judgment after being advised by the result of the primary and in other proper ways.

This brief memorandum will in due time be followed by a brief discussion of some phases of the primary law.

The following opinion was filed April 21, 1910:

MARSHALL, J. (*concurring*). When this case was decided I filed a memorandum of points understood by me to be covered by the court's opinion, to be followed by a concurring opinion. This is pursuant thereto. I will endeavor to show: (a) As an original matter, a law cannot be made by creating one, in form, leaving it to the people to or not to convert such form into law in fact; (b) the significantly alleged features of the primary law, which, were they in fact a part of it, would, doubtless, render it unconstitutional, are not there either in its letter or spirit; (c) liberty of action alleged to be unconstitutionally restrained or prohibited, on the contrary is contemplated and encouraged; (d) the feature as to United States senators does not impose any duty on nor permit surrender of, by members of the legislature, their respective judgments.

The foregoing challenges attention as involving questions of far-reaching importance. Nothing approaching the dignity of the matter often comes to this court. Individual shades of thought and lines of logic, leading to final conclusions in which the justices concur, could not easily, if at all, be indicated in an opinion, speaking with the necessary sin-

gleness of the court, yet such individual logic may give much force to the legal and moral effect of the thought in the aggregate, which must stand out as that of the court. Expression of individual judicial views on great constitutional questions, is always permissible, is often advisable, and is sometimes, seemingly, almost necessary. For added vindication of the court's position and of my own guarded concurrence in one respect and emphatic concurrence in others, after a careful study and analysis of the primary act, and for the good it may do in dignifying and entrenching our valuable principles of constitutional liberty, lifting them so far above any existing tendency to encroach upon the sacred field of inherent human rights, as to minimize danger of any one of them being destroyed or seriously impaired,—this opinion is written. The labor is not indulged in with any thought of mere exploitation of individual ideas, but rather of judicially aiding in keeping significantly in view, those principles which the constitution builders aimed to declare and have preserved, unimpaired, as an essential part of our system, and at the same time, of vindicating the wisdom of the legislature wherein it has been severely criticised and its legitimacy confidently challenged. To do the latter, while upholding the constitution in all its integrity, not swerving one way—giving appearance of impatience with its restraints and a purpose to reduce them to a minimum as much as possible, which method would result in practical nullification—nor the other, suggesting narrowness on the part of the fathers, which they were, in fact, entirely free from; but taking that broad view which gives the constitution the effect intended, viz.: to secure the inherent rights of men.

It seems that overleaping desire for change, at times colors mental views, so that men are wont to survey our system from the viewpoint of ancient conceptions of man's status; that one's liberty and property and freedom to enjoy and acquire the latter are mere privileges afforded by grace of a sov-

ereign, instead of ours, which displaced it, that all those mere privileges of the ancient system are inherent rights, not rights conferred by any human power, nor subject to be taken away by such power; *but birthrights;* that they may be regulated; but that regulation to be legitimate must be within the spirit of the constitution, *i. e.* to preserve, to secure their integrity and competency to conserve human enjoyment; that at the dividing line between regulation which conserves and that which impairs, is the one between the legitimate and the illegitimate, in legislation. Danger of encroaching upon this line, which is sometimes seen in legislative acts passed or proposed, was foreseen, as well as importance of vigilance to guard against it. So the fathers closed the fundamental guarantees by this admonishment:

"The blessings of a free government can only be maintained by a firm adherence to justice, moderation, frugality and virtue, and by a frequent recurrence to fundamental principles."

So recurring I will endeavor to discuss the questions involved in this case.

I yield very reluctant concurrence with the idea that it is constitutional for the legislature to pass a general act to become a law upon its being approved by popular vote. I yield upon the ground of *stare decisis* only. I dissent from the view that such an act is sustainable from an original standpoint, and that there is no logical distinction between a local act to become law *in præsenti,* but be operative only in such localities as by popular vote adopt it, and a general act, presently proposed by the legislature, to be a law when approved by popular vote.

True, this court, in *State ex rel. Att'y Gen. v. O'Neill,* 24 Wis. 149, 154, upheld the referendum principle as to a local option law and said, entirely *obiter,* approving the reasoning in *State v. Parker,* 26 Vt. 357, 365, that it is illogical to sustain such principle as to a local option law and to condemn a

general act to take effect as law only upon approval by popular vote, and such *obiter* remarks were given judicial approval in *Smith v. Janesville,* 26 Wis. 291. But I cannot ascribe such infallibility to the reasoning supporting such early observations as to adopt it now as sound. When it was made the question involved was new. Since then it has received attention by many courts.

The Vermont case, in the extreme, does not appear to have been followed there. Each decision cited therein either involved a local option law or has been displaced where made by some later decision. Neither the Vermont case nor *Smith v. Janesville* has been followed anywhere in such a case as this, while the doctrine thereof has been condemned over and over again. *Barto v. Himrod,* 8 N. Y. 483, 490, which the Vermont court, and this court following Vermont, criticised as not authoritative, has, since such criticisms were made, been affirmed, most emphatically, many times. *People v. Fire Asso.* 92 N. Y. 311; *Gilbert E. R. Co. v. Kobbe,* 70 N. Y. 361; *Matter of Thirty-fourth St. R. Co.* 102 N. Y. 343, 7 N. E. 472; *People v. L. I. R. Co.* 134 N. Y. 506, 31 N. E. 873; *Stanton v. Essex Co.* 191 N. Y. 428, 84 N. E. 380.

People v. Collins, 3 Mich. 343, which the Vermont court ignored because of the justices being evenly divided, as was said, was explained in *Feek v. Town Board,* 82 Mich. 393, 47 N. W. 37, the doctrine of the New York court being fully adopted restricting the referendum principle to local option laws, it being said that in *People v. Collins,* "No one of the judges contended that, had the effect of the submission of the act been to determine whether" it "should become a law or not," it "would have been valid." Adding: "The power of the legislature . . . to pass an act, and then to take the sense of the people whether it shall become a law or not, was not admitted nor has it ever been in this state." The supreme court of Pennsylvania, also cited by the Ver-

mont court, subsequently took the same view. *Comm. ex rel. McClain v. Locke,* 72 Pa. St. 491. If there is a decision following *Smith v. Janesville,* as to the precise question here, counsel were not able to find it and we have not been more successful.

As to local option laws, even, the referendum principle has been, by many courts, reluctantly sustained and by divided courts quite often. *Fell v. State,* 42 Md. 71; *State ex rel. Maggard v. Pond,* 93 Mo. 606, 6 S. W. 469; *Paul v. Gloucester Co.* 50 N. J. Law, 585, 15 Atl. 272.

Barto v. Himrod, supra, has been followed in many jurisdictions which uphold local option laws, as does the New York court. *Ex parte Wall,* 48 Cal. 279; *Ex parte Anderson,* 134 Cal. 69, 66 Pac. 194; *State v. Weir,* 33 Iowa, 134; *State v. Metcalf,* 33 Iowa, 610; *Lytle v. May,* 49 Iowa, 224; *Eckerson v. Des Moines,* 137 Iowa, 452, 478, 115 N. W. 177; *Lammert v. Lidwell,* 62 Mo. 188; *Rice v. Foster,* 4 Harr. (Del.) 479; *Parker v. Comm.* 6 Pa. St. 507.

True, *Smith v. Janesville* has been referred to here with approval, not, however, to the point now involved, but to the general proposition that the legislature can make "a law complete in itself" and leave the question of its enforcement to turn upon future ascertainment of some fact or happening of some contingency. Note the significance of the language: "a law complete in itself." The infirmity here, as courts generally have viewed the matter, is the legislative effort did not create a law "complete in itself," as in case of a local option law. It left to popular judgment whether a proposal should or should not be a law. It made a form only for a law, leaving it to the people to vitalize it, by evolving it into a law. That seems unmistakable. It was provided that whether the act "shall take effect . . . shall be submitted to the people of this state. . . . If approved by a majority of the votes cast upon that question, it shall go into effect and be in force from and after such ratification by the people."

Such contingency of its becoming a law, fixing the time thereof, if at all, as that of popular approval, is the precise distinguishing characteristic between such laws and local option laws, which has resulted in the general condemnation of the former. They are not "laws complete in themselves" upon emanating from the legislature, with executive approval, but mere propositions to the people of acts for their adoption as laws, or rejection. In all New York cases that distinction is clearly drawn, as a few quotations will clearly show.

In *People v. Fire Asso.* 92 N. Y. 311, 316, affirming *Barto v. Himrod,* 8 N. Y. 483, the court said:

"As to the school law, the people were made the legislature, and left to decide whether the bill proposed should or should not become a law. . This court held that the legislature, under the constitution, could not so delegate its power, but was bound to determine for itself the expediency of the measure, and either enact or reject it."

Again, in *People v. L. I. R. Co.* 134 N. Y. 506, 31 N. E. 873, the court, approving the early case, declared thus:

"The difficulty with the statute there was . . . that it provided for the submission to the electors to determine whether the act should or should not become a law."

Again, in *Gilbert E. R. Co. v. Kobbe,* 70 N. Y. 361, this language was used:

"The existence of the law itself in that case [*Barto v. Himrod*] was made to depend on the vote of the people."

Lastly, in the very late case of *Stanton v. Essex Co.* 191 N. Y. 428, 432, 84 N. E. 380, the court said:

"The senators and assemblymen are selected by the electors of their respective districts to represent them in the legislature of the state and to enact such laws as shall be requisite and advisable. The people, who have intrusted them with legislative power, have the right to demand the exercise of their knowledge, judgment and discretion in the framing

and in the enactment of laws, and in so far as their duties are strictly legislative, have prohibited them from delegating that power to others. It was consequently held in *Barto v. Himrod,* 8 N. Y. 483, that an act establishing free schools throughout the state was unconstitutional and void, for the reason that the fact of its becoming a law was made to depend upon the result of popular vote."

Other courts are quite as emphatic. To illustrate, in *Lammert v. Lidwell,* 62 Mo. 188, 194, we read:

"It is not only the right of the representatives, when assembled in the legislature, to make laws, but it is their duty to do so. When the people, through the constitution, delegated the lawmaking power to the legislature, it conferred an authority and imposed a duty which could not be exercised by any other body of men. Therefore, every law, to have any binding force or validity, must, when it emanates from the legislative body, have the form and character of a complete enactment. It must operate by virtue of the legislative authority, and not depend upon popular action or the people's suffrages for its vitality."

And further, in effect, whether an act shall or shall not be law cannot be made to depend upon its existence as law upon popular vote. And further, citing approvingly the logic of the supreme court of New Jersey:

"The will of the legislature must be expressed in the form of a law by their own act. If it is left to the contingency of a popular vote to pronounce whether it shall take effect, it is not the will of the lawmakers, but the voice of their constituents, which moulds the rule of action. If the vote is in the affirmative it is law; if in the negative it is not law. The vote makes or defeats the law, and thus the people are permitted unlawfully to resume the right of which they have divested themselves, by a written constitution, to declare by their own direct action what shall be law."

Pages of judicial learning of the character above given might be quoted. The idea, that a vote of the people favorable to a proposed law, without which it cannot be "a law complete in itself," is a contingency upon which "a law com-

plete in itself" is dependable for vitality, is generally rejected.

Existence or nonexistence of a law is one thing. That involves wholly matter of expediency and is wholly within the legislative field. Whether a law "complete in itself" shall be put in force is another. It is the latter which may be made to depend upon a future contingency. It seems the court, in the *Janesville Case* (26 Wis. 291), confused the two, holding that a mere proposal for a law, complete in form, is "a law complete in itself," within the meaning of local option decisions, and so reached the conclusion, in effect, that the contingency upon which a proposed form for a law may be law in fact may be a favorable popular vote.

The foregoing sufficiently shows why I cannot concur with all grounds for the decision on the first point discussed in the court's opinion. The doctrine that laws may be made by the referendum process—and I cannot escape the conclusion that such is the effect of the rule followed—seems to be subversive of one of the basic principles of our form of government. While the constitution declares that the chosen members of the legislature shall be the lawmakers, such doctrine is to the effect that they may lay the burden upon the people at large.

I cannot bring myself to concur with my brethren on the first point, even on the ground of *stare decisis,* without extreme hesitation. I would prefer to join, if it were possible, in overruling *Smith v. Janesville,* and make the law of this state harmonize with that of the country generally. The court would be warranted in that, to save an important constitutional principle, especially where it will not disturb any rule of property. It should be done now, if ever, as to the point under discussion. However, my brethren being unanimous on the ground of *stare decisis,* primarily, I will concur but not on any other.

It is dangerous for a court to refuse to correct an early

mistake on a great question of constitutional law, where a remedy may be applied without disturbing vested personal or property rights. "Consistency is a jewel" as applied to judicial holdings as well as to human actions in general, yet it is not so priceless but what it were better to sacrifice it, in some instances, than to purchase it in exchange for a fundamental principle.

In the foregoing there is no purpose to condemn, in the slightest degree, as an original matter, the making of laws by the referendum process. Such method may be, from an original standpoint, the height of wisdom. The question is, What is the policy incorporated in the constitution? If that be not the best, it should be changed if at all in the constitutional way, not by subverting the fundamental law. The same power that established one way can change or abolish it altogether. The wisest course, the safest course, and the only right course, is to maintain the integrity of the constitution as we find it, till the power which made it sees fit, in the manner provided by it, to change it.

The government of this country, as said by Chief Justice MARSHALL in *Marbury v. Madison,* 1 Cranch, 137, is a government of laws and not of men. That fundamental idea must not be forgotten. Any departure from it endangers the very purpose of government to conserve our birthrights. The constitution is the paramount law. Legislatures and judges are sworn to support it as they find it, regardless of their notions of expediency from an original standpoint. It having delegated power to make laws to a particular agency, that agency is exclusive. If it were for legislatures or courts, by any ingenious contrivance, to do in one way what the people, in the exercise of their original right to create a governmental fabric, ordained shall be done in a particular way, such assumed omnipotence to abuse or abdicate a trust would neutralize the dominant feature which is the crowning idea of any written constitution. It is upon these consider-

ations that I so question the referendum method of making law, regarding *Smith v. Janesville* to have seriously invaded our constitutional system. Yet by long tacit adherence thereto, the error, as we have seen, has become so implanted in our system that, standing alone, I could not change it if I would. Because of the futile character, at this late day, of a formal dissent, I submit to go with my associates, expressing no opinion as to whether it were better that the people had, unquestionably, reserved unto themselves authority to both initiate and make laws.

I concur that the primary act does not violate the guaranteed right to "peaceably assemble to consult for the common good" nor the general spirit of the constitution guaranteeing liberty of citizens to maintain political parties and to do all things reasonably necessary to make party organizations effective to secure vitality of their principles. I concur for reasons stated in the court's opinion, and for others necessarily inferable therefrom, and for still others.

It is contended for appellant that the legislature cannot prohibit party conventions and declarations thereat of party principles. I understand the learned attorney general to freely concede that, but to contend there is no such prohibition. Appellant's counsel concede there is no express prohibition, as the fact is, but suggest that the spirit of the law supplies want thereof; that such has been the practical construction of the law, and that it should be treated accordingly.

So it is, in effect, argued that the law should be viewed in its spirit and condemned the same as if what is suggested to be in spirit included therein, were expressed in the letter. The constitutionality of a law is not to be thus tested. It is to be upheld as legitimate, unless it is otherwise beyond reasonable doubt. If in letter, it is constitutional, it should be sustained as thus expressing the legislative purpose, rather than to seek by construction, for a meaning which will require its condemnation. The letter may be violated to sus-

tain an act in its spirit, if in the latter it is legitimate though in the former it is not. It should not be unnecessarily viewed in a supposed spirit to condemn it, since it is not to be thought the purpose of a lawmaking power, in any instance, to have been to violate the constitution.

It must be conceded that, under our form of government, political parties are promotive of public welfare; that they cannot exist without organizations and that the organizations cannot exist without freedom to assemble in mass or delegate conventions for the purpose of consultation as to party policies and declaring such policies. Therefore, it is not reasonable, unless it is unavoidable, to conclude any legislative enactment to have been intended to abolish or abridge opportunity to do those essential things or to make doing the same, or any thereof, contrary to public morals. On the other hand, it would seem that the holding of party conventions should be regarded as not only permissible but commendable, instead of reprehensible, in the absence of unmistakable words in the written law to the contrary. Perfect freedom, in that regard, has existed from the foundation of our American system. Its continued existence is necessary to the maintenance of that system. Common sense teaches it; experience affirms it; the constitution in spirit guarantees it; and every court that has spoken on the subject has recognized and dignified it.

The supreme court of California in *Britton v. Board of Elec. Comm'rs,* 129 Cal. 337, 61 Pac. 1115, voiced the common judicial sentiment in these words:

"No one can be so ignorant as not to appreciate the value, indeed the necessity, of opposing political parties in a government such as ours. No one, it would seem, can be so thoughtless as not to realize that government by the people is a progressive institution which seeks to give expression and effect to the wisest and best ideas of its members. No declaration is needed in the Declaration of Rights to the effect that electors holding certain political principles in common may

freely assemble, organize themselves into a political party, and use all legitimate means to carry their principles of government into actual operation. . . . It is inherent in the very form and substance of our government and needs no expression in the constitution."

And further, in effect, conventions of political parties have long been known in the history of this country. The right of members of a political party to freely assemble, deliberate and act, to promote the interest of such party, is a right guaranteed by the constitution, state and national. Freedom to do those things, reasonably appropriate to the effective maintenance of party organization, cannot be abridged. "Self-preservation is an inherent right of political parties as well as of individuals." The California court, in connection with these emphatic declarations, freely acknowledged the constitutional right of such regulation of political parties as serves to promote their legitimate end, while denying the existence of that power of regulation which would turn a shield designed to protect into a sword to destroy.

Every court which has considered any of the numerous modern efforts to regulate the process of selecting party candidates for public office, has recognized not only the legitimacy but the importance of political parties. Regulation acts all dignify that idea, making political parties a part of the election instrumentalities of the state. The purpose, and the only legitimate one, of such an act is to regulate for conservation, not for prejudicial restriction or destruction. In construing such an act, if in its letter or from one point of view such purpose is violated, courts should look at it in some other aspect, or in its spirit, if need be, taking into consideration the abuses designed to be corrected and all appropriate rules for judicial construction, in order to arrive at a meaning within the scope of the language used in the act, consistent with guaranteed rights.

True, history under the primary act would indicate that

the idea had taken root that it prohibits holding party conventions with any of the former usual purposes. But one will search the law in vain to find any such idea therein, or anything to reasonably lead to that conclusion, except that a party candidate, however suggested, cannot have his name placed on the official ballot unless he receives, at least, a plurality approval of such members of his party as may see fit to vote at a primary election conducted as the law provides.

It being conceded that political parties are necessary under our system and assemblages of some sort of party members are appropriate, if not necessary, to their effective maintenance, that the primary act contains no prohibition in that regard, it is useless to claim that the act either outlaws political conventions or makes the holding of the same contrary to public morals.

It is suggested that the law unreasonably interferes to prevent the making of party platforms in convention as well as the nomination of candidates thereat, since it provides a different way for each. True, as it seems, only to the extent that the party platform as it may be promulgated by a party convention, or other party authority, must be put into its final form by the party candidates nominated at the primary, and that candidates, if suggested at a convention, must obtain indorsement at the primary as a condition precedent to their names being placed on the official ballot. The required indorsement may well have been, and doubtless was, considered by many, at least, who voted for the primary act, a means of rendering ineffective such abuses in securing a place on the official ballot by the old way, as had in the judgment of some commonly occurred, and were liable to occur again, by compelling a candidate, notwithstanding the convention indorsement, to stand the test of the primary as well.

Not only is there perfect freedom of party action as indicated, for aught there is in the primary act, but I think it clearly contemplates such action. Such indications are

many. They were, doubtless, incorporated therein for the very purpose of preventing successful attack upon its validity. I will specify some of them.

Existing political organizations of parties were not, in any respect, abolished or prohibited. Moreover they were dignified as a part of the state election system, as we have seen.

Sec. 21 requires creation of all political committees which had been customary, from state committees down to committees of voting precincts. Such preservation and dignification of the old organizations must have been for a purpose. It would be unreasonable to suppose that such a perfect system was preserved as a mere matter of form; that the legislative thought was to preserve such political machinery and yet destroy the effectiveness thereof. It must have been thought, by many at least, who consented to pass the act, that the party committees so carefully provided for, in harmony with existing conditions, and the members of the respective parties, would be left free to do, in general, everything commonly done which was not prohibited. The inference to that effect seems irresistible from the fact that, after providing for all the usual committees, they were not prohibited from acting as before, except in so far as inconsistent with the act. Consistency would obviously require convention candidates to secure indorsement at the primary before having their names placed on the official ballot and a specified indorsement before having their names go on the primary ballot. There is no express or implied prohibition of convention nominees having their names, in due course, so placed, and, if it were otherwise, there would probably be no division of opinion as to its being an illegitimate interference. But to put the matter beyond all reasonable controversy, the legislature industriously provided that "Each committee and its officers shall have the powers usually exercised by such committees, and by the officers thereof, in so far as is consistent with this

act." And, further, to prevent even temporary interference with other party operations as theretofore, it was provided that the existing nonofficial committees should, till the election of their successors under the primary law, exercise all power mentioned.

Now as to the declaration of party principles by which electors must test their political status, there are clear indications that pre-primary announcement by conventions or by some party authority was contemplated. How could a candidate know, with any definiteness, the principles of his party in advance of some such declaration? Is it reasonable to suppose it was contemplated that knowledge of the party principles would be postponed till the declaration by the candidates should be given out as provided in sec. 22 of the act? The idea of nominating a party candidate without knowledge *in præsenti,* of the party principles for which he will stand, leaving it to him and his associates to proclaim to the members of the party the party principles, has appeared so absurd as to be pointed to as a most glaring infirmity of the act. That idea, in my judgment, is no more a part of the law, in fact, when reasonably construed, than the one that it prohibits holding party conventions. It not only is not in the act, but significant features thereof clearly, to my mind, negative its being there.

One of the features suggested is in sec. 5. Each signer of a party nomination paper is required to proclaim therein the party to which he belongs, and that he nominates the candidate named by him "as representing the principles of said party" and that he intends to support such candidate. Does not that, necessarily, presuppose common present knowledge by members of the party of the party principles? Does it not clearly negative the idea that candidates after being nominated are to then proclaim to those who nominated them what their principles are, in respect to which all had previously pledged themselves? How could one make his affi-

davit without party principles having been, by some party authority, made known prior thereto? How could they be so made known, except by a party conference at which all members of the party would have opportunity to be heard personally, or representatively, through operation of party machinery? Moreover, how could one named at the primary to stand for party principles make the affidavit required by secs. 11–18 of the primary act, as amended—that he will qualify if elected, in effect, making oath that he will, if elected, take office and strive to vitalize the principles of the party,—unless, in contemplation of law, he then knows what those party principles are? How can he then know them if the party platform is to be made instead of merely "formulated" at the meeting required to be held under sec. 22, since the latter event is required to occur long after the former? Again, how can the party principles, referred to in the nomination paper, or contemplated in the affidavit of the party candidate, have any reference to the, now customary, personal declaration of a party candidate as to where "he stands"—something very novel, if not unheard of before the primary law? Does not the required declaration under oath of the party nominator and that of the party nominee, condemn the idea that the mere personal declaration of a would-be party nominee as to "where he stands," is the test of party faith prescribed by party authority, to which both nominator and nominee are required to pledge themselves? The personal declaration may be known when the nomination paper is filed, but very little, if any part of it, may be embodied in the "formulation" of the platform, which subsequently occurs. It could not stand as a party pledge, in any event, except in a personal party sense, since not put forth by political party authority. Yet the declarant—if a somewhat popular notion of the primary law is right—is liable to find himself in the dilemma of trying to ride several political horses at the same time, one of his own creation before

the primary, one created by some party authority prior to the signing of the nomination papers, one created by himself and associate candidates subsequent to the primary, and one created by the national party authority.

The idea that the primary law was framed on the lines suggested should not be thought of for a moment, if the words thereof do not unmistakably require it. When we see that the scheme in all its parts contemplates some authoritative declaration of party principles before the signing of nomination papers, and with reference to which the nomination pledge would be made and to which future action would be referable, all parts of the law harmonize with a rational conception, and all supposed unreasonable and so unconstitutional interferences in respect to the matter, disappear.

Further plain indications that the primary act contemplates knowledge of the party principles to be contended for at the coming election, before signing nomination papers, is found in sec. 22. While it provides for a meeting of party candidates for platform purposes, it does not provide that they shall make a platform, but that they shall "formulate" one. Why did the legislature so industriously use the word "formulate" if "make" was meant? Formulate is satisfied without making at all, in the sense of an original declaration of principles. The common meaning of the term "formulate," is to reduce to a form; to express in formula; to put in a clear and definite form of statement or expression. To originate is one thing; to put in concise form of expression understood principles is another. That the law contemplates the latter only, is made plain because it provides that upon the day for the meeting of candidates for platform purposes, they shall "forthwith formulate" (put in concise form of expression) "the state platform of their party." No time is allowed for deliberation, as in case of an original declaration of party principles. All is consistent with there having been, previously, such a declaration. Candidates are re-

quired to meet at 12 o'clock noon and "formulate" the platform "before doing any other business." Thereupon they are required to do much other prescribed business, all other proper business desired and to publish the platform before 6 p. m. the day following that of the meeting.

Why such haste? Is it at all consistent with the idea of that deliberation and discussion of, and agreement upon party policies, necessary to the making of a party platform in the ordinary sense and which the constitution guarantees opportunity for? At the same time is it not perfectly consistent with the idea of the party policies being known at the time of making the pledge by nominators and affidavits of nominees? The suggested answers make sec. 22, supposed by many to be absurd, and pointed to as an altogether senseless, a fair enactment.

I concur that the feature of the primary act as to nomination of candidates for United States senators, properly construed, is not unconstitutional, for reasons stated in the court's opinion, which will bear further elaboration.

It cannot be made too plain or too emphatic that, while the national constitution remains as it came from the fathers, all attempts to directly, or indirectly, nullify or materially weaken the requirement that United States senators shall be chosen (appointed) by state legislatures, must fail. The dignity of the provision in that regard has not been appreciated by some courts which have dealt with the matter.

It has been said by some courts, quite correctly, that the action of the primary is no more or less than a method of exercising the right of petition and that the agents petitioned to are no more bound thereby than in any other case of like manifestations of desire. In others, it has been said, quite loosely, that the result of the primary does not create a legal duty; it only creates a species of obligation. How there can be a legal obligation without a corresponding duty, is hard to perceive. The logic, in the literal sense, seems absurd. If

it be meant an obligation to respectfully consider the wishes of the petitioners and their reasons in connection with all other matters bearing on the question, in forming judgment respecting exercise of the constitutional power of appointment, I perceive no infirmity in it. If it means an obligation, legal or moral, to surrender the discretion incident to the constitutional power of appointment vested in the members of the legislature, then, manifestly, the law, so construed, would be nugatory.

One of the most troublesome questions in the constitutional convention was, whether senators should be elected by the people or appointed by the state legislatures. There were two radically different schools on the subject, and a third of lesser significance, as indicated in the court's opinion.

The views of those who advocated leaving the duty of selecting senators with the state legislatures as an appointing power, prevailed and for reasons, in the main, inconsistent with an election directly, or indirectly, by the people, or the members of the legislature acting in the discharge of their duties otherwise than according to their own unbiased, uncoerced judgment. The term "elected" was eliminated and the term "appointed" used instead in the final act of the national drama. This was the form in which the matter was put: "Motion for an appointment of the senators by the state legislatures." On this all the states represented, ten in number, voted "Aye." Rhode Island, New Hampshire, and New Jersey were not represented in the final vote.

The school of statesmen which advocated election by the people did not submit to the convention plan. In the contest over the question of ratification, the merits and demerits of such plan were fully discussed, the leaders in the affirmative being Hamilton, Madison, and Jay. They argued that the very purpose of a senate required the appointment of its members to be removed from the source of selection of members of the popular branch, as far as practicable; such pur-

pose being to prevent popular impulses *in præsenti*,—liable to be produced by the appeals of well-meaning theorists or of thoughtless demagogues bent on promoting selfish ends by arousing unreasonable prejudice,—to be regretted upon reflection and consideration after reason had resumed its customary sway, from controlling in directing the important affairs of government of a great people. It was said that there was as much danger from the abuse of liberty as from the abuse of power, and that while one body should be selected by such method as to minimize the danger of the latter the other should be selected by a far different method, one most likely to guard against danger of the former.

In harmony with the peculiar functions of the senate to secure the country against danger of hasty action under the impulse of popular clamor of the hour, and to furnish the element of conservative force requisite to a stable, safe government, on the basis of our American conception of the rights of men, it was in effect urged that the senate should have a dignity and permanency and independence of mere momentary popular interference, akin to the high judicial status, and so should have the source of selection of its members removed from that of the popular branch. Mr. Madison, speaking on the subject, said:

"It must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures and with the genuine principles of republican government."

Referring, in support of that idea, to the lessons of history, it was said, in substance: No republic ever long existed without a senate and in case of one, permanency was promoted or otherwise as the plan of organization assimilated to the one proposed. Such a body as the proposed senate has never been successfully oppressively dominant but been, in the long run, uniformly a conservative force making for the public good and the strength and permanency of the govern-

ment. Selection of members of the higher branch, designed to be the legislative balancing feature, can best be made by a deliberative, representative body, selected by the people. The tendency has been for the popular branch to encroach upon the senate rather than for the latter to encroach upon the former. As the power of the senate for the purposes of its creation became weakened the government became weakened also and the tendency was to decay.

After a long period of public discussion and of education the people adopted the constitution, fully understanding that the members of the respective legislatures, untrammeled by interferences with the exercise of judgment, would be charged with the important duty of appointing United States senators.

Can it be supposed that, had the question of whether it was competent for the people, by a primary election method, to impose upon the members of a legislature, either a legal duty or a moral obligation to surrender their respective individual judgments in respect to the choice of a United States senator, come before the first great judicial expounder of the constitution, Chief Justice MARSHALL, with all the circumstances of the adoption of the convention plan before him, there would have been any hesitancy in answering in the negative?

It must not be lost sight of that United States senators are federal, not state officers. The legislature of a state has no more right to change the appointing power reposed in it by the federal constitution as to the matter in question than in respect to any other power lodged by the constitution in it exclusively. It has no more authority to abdicate its functions by descending from its constitutional status as a repository of federal appointing power, to the level of a mere agency to effectuate the result of a popular choice, as indicated by a vote of the people, than it has to provide that the justices of this court shall, in applying the law, submit to be guided by popular advice or judgment.

If the system as stated is not the best policy, independently of fundamental limitations, it can only be legitimately changed by the power of the people of the country at large, in the exercise of their constitutional right to change the constitution. There can be no legitimate mere state interference, and all ingenious contrivances to that end should fail and fail utterly. If a course of action which, with good motives or bad motives, could successfully improperly interfere in one field it could do so in all directions, and the skill of those who might be impatient of the fundamental restraints which, properly applied, would limit their capacity to vitalize their theories of government, would not be found inadequate, in practical effect, to subvert the constitution altogether; that instrument which has been characterized by statesmen on two continents as the greatest single achievement of the human mind in the century in which it was produced.

The logic of the court's opinion on this last branch of the case, to me, seems unanswerable. If the primary act were construed as imposing upon members of the legislature, either the legal duty or moral obligation to abide by the verdict rendered at the election, it would require judicial condemnation. It can only be supported on the theory that it is merely advisory, from the standpoint of citizen petitioners as of the time of holding the primary, and of much, or little or no significance whatever, according to circumstances.

It might manifestly be the duty of members of the legislature belonging to a particular party to vote for some other person than the one petitioned for by members of such party, who voted at the primary. He might have but a small minority support of the party though having a plurality. He might be found on investigation not to be truly representative of the party principles. The aspect of his candidacy might entirely change in the interim between the primary and exercise of the appointing power, so that the advice of the party petitioners who voted at the primary, under different circum-

stances could not properly have any weight and the petitioners would, in the new situation, as largely concur in their former advice being ignored as they did in giving it. So it is not only the right but the sworn duty of members of the legislature to exercise their respective official judgments, giving to the result of the circumstantial preference suggested at the primary, just such weight as, in their wisdom, may seem best and no more. In that view, the part of the act under discussion is sustainable and not otherwise, and such is but elaborating the views of the court, as I understand them.

Construed as the court construes the primary law, and as I view it, consistent with the court's decision, it is free from the imperfections which have been commonly pointed out as grounds for condemning it and it is, throughout, a fair, sensible, constitutional piece of legislation. Of its wisdom I need not speak. If the practice under it and the common criticisms of it have been upon a false theory, one which if incorporated therein would render it destructive and void instead of regulative and beneficial, that is not the fault of the law, but of the people in following false theories, as I think, instead of asserting and enjoying their constitutional rights, which are rather conserved than injuriously interfered with, by the law.

WICKERT, Appellant, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Respondent.

March 15—April 5, 1910.

Negligence: When actionable: Likelihood of injury: Imputed knowledge: Carriers: Knowledge as to who are passengers: Injury to person alighting from train.

1. Actionable negligence is not shown unless it appears that the person sought to be charged therewith had knowledge, actual or imputed, that his act or omission complained of was likely to cause injury or damage.
2. Such knowledge is imputed, among other instances, where a person of ordinary care and prudence under the same or similar circumstances ought to have known the likelihood of injury.
3. When a railroad train is stopped at a station for the reception of passengers, the trainmen, in the absence of evidence to the contrary, are justified in presuming that those who board the train are passengers intending to remain thereon and depart from such station.
4. Leavetaking and farewells among the members of a group upon a depot platform, not actually heard or noticed by the trainmen, are not sufficient to charge the latter with knowledge as to which members of the group are passengers and which members are friends who are merely taking leave of the passengers.
5. There was no negligence in giving a signal to start a passenger train, or in starting pursuant to such signal, while a person not a passenger was descending the steps of a car, where the trainmen had no notice or knowledge, actual or imputed, that such person was alighting or intended to alight, but rather had a right to presume that he had boarded the train as a passenger, intending to remain thereon.

APPEAL from a judgment of the circuit court for Marquette county: A. H. REID, Judge. *Affirmed.*

The appeal is from a judgment entered upon a verdict directed for defendant in an action to recover damages for personal injury caused by defendant's negligence.

D. W. McNamara, for the appellant, cited, among other cases, *Townley v. C., M. & St. P. R. Co.* 53 Wis. 626, 11 N.

W. 55; *Davis v. C. & N. W. R. Co.* 58 Wis. 646, 17 N. W. 406; *Cahill v. Layton,* 57 Wis. 600, 16 N. W. 1; *Dowd v. C., M. & St. P. R. Co.* 84 Wis. 105, 54 N. W. 24; *Langhoff v. M. & P. du C. R. Co.* 19 Wis. 489; *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573.

For the respondent there was a brief by *Walter D. Corrigan* and *Clifton Williams,* and oral argument by *Mr. Williams.* Besides other authorities, they cited *Griswold v. C. & N. W. R. Co.* 64 Wis. 652, 26 N. W. 101; *Ives v. Wis. Cent. R. Co.* 128 Wis. 357, 107 N. W. 452; *Morey v. Lake Superior T. & T. Co.* 125 Wis. 148, 103 N. W. 271.

TIMLIN, J. The question presented by this appeal is whether the circuit court properly directed a verdict for defendant. In order to make out a case of actionable negligence it must appear that the person sought to be charged therewith had knowledge that his act or omission complained of was likely to cause injury to some person or thing. This knowledge may be either actual or imputed. Knowledge of this dangerous quality of the act or omission in question is or may be imputed in a great number of instances, among them when there is a duty to know, and also when a person of ordinary care and prudence under the same or similar circumstances in the exercise of ordinary care ought to have known of this likelihood. *Hasbrouck v. Armour & Co.* 139 Wis. 357, 121 N. W. 157. Like other subjects of legal investigation, these may be questions of fact, questions of law, or mixed questions of fact and law in a given case. The uncontradicted evidence in the instant case establishes the following: The sister and the niece of plaintiff, with the three children of this niece, were passengers waiting on the depot platform for the arrival of the train which they were about to board. The plaintiff and her grown-up daughter accompanied these passengers for the purpose of seeing them off. The passenger train in question, having one passenger coach

next behind the smoking car, stopped at the station, the passengers, of whom there was quite a large number alighting at this station, were descending the steps at the front end of this passenger coach, and the conductor was assisting these passengers to descend, standing with his face toward the descending passengers and toward the passenger coach. The group of seven, including the said passengers about to embark and the plaintiff and her daughter, while the conductor was so engaged stood behind him, said their farewells, and exchanged parting kisses. The plaintiff's niece first, and then plaintiff's sister, ascended the steps of the smoking car to the platform of that car, from which point the niece called out to plaintiff, "Aunt, bring up the baby and the satchel." The niece then went into the passenger car and took a seat. Plaintiff's sister remained near the door of the passenger car. Plaintiff ascended the steps of the smoking car, crossed the platform of this car and the platform of the passenger car to where her sister was standing, gave the satchel to the latter, turned and began to descend the steps of the passenger car, and had reached the second step in her descent when the train began to move out moderately, whereupon she became dizzy and soon fell from the steps sustaining injuries. When the plaintiff was ascending the steps leading to the platform of the smoking car and after she had reached that platform the passengers from the other car were still descending the steps of that car, but after she delivered the satchel to her sister and started to descend there was no other person descending the steps and no conductor in sight. The conductor, after looking along his train and seeing no one attempting to board the train or to descend from either car, called out, "All aboard," and gave the signal to the engineer to pull out. The engineer rang his bell and started his engine and moved out. The conductor from the place at which he stood when he gave the signal to start, as fixed by his uncontroverted testimony, could not see the plaintiff because

she had not at that time reached the second step in her descent. The signal must have preceded the starting of the train, and the signal and the starting could not have been simultaneous. The plaintiff tarried somewhere on either car platform before attempting to descend. Neither the conductor nor the brakeman had any actual knowledge that the plaintiff was upon the car platform with the intention of alighting therefrom before the train started or that she was not a passenger, and neither observed the leavetaking, heard the farewells, or saw the kisses on the depot platform, or heard the call, "Aunt, bring up the baby and the satchel." The plaintiff, however, contends that the leavetaking, farewells, and kisses on the depot platform occurred so near to the conductor that he might, notwithstanding his denial, have heard them, or that in the exercise of ordinary care he ought to have observed them, and consequently to have known that the plaintiff was not a passenger, but intended to alight from the car platform before the train started, and that the conductor was therefore negligent in giving the signal to start without first ascertaining whether the plaintiff had descended.

If we assume for the purpose of this case and as most favorable to appellant that, notwithstanding the denial by the conductor and by the brakeman that they observed these farewells or knew that the plaintiff was not a passenger, there still was an issue of fact involving the question whether they had actually observed or whether they ought to have observed the conduct of the plaintiff and the other passengers, still we think that the real probative effect of such conduct was not as claimed by the appellant. If farewells and kisses were exchanged on the depot platform, the fair inference would be that there the parting took place, and that those who remained on the platform were the friends who had taken leave, and those who boarded the train thereafter were the departing passengers. The daughter of plaintiff remained on the depot platform. All other members of the group ascended the

steps of the smoking car. The plaintiff ascended last and in response to a request to bring up the baby and the satchel, but there was nothing in the request to inform any one who overheard it that she was not a passenger. It is a fair inference, although perhaps not a very strong one, that all those who board a train stopped at a station for the reception of passengers are passengers. In the absence of evidence to the contrary the trainmen are justified in so presuming. We find no evidence here of any indications to the contrary. There was therefore no evidence upon which the jury would have been justified in finding that the defendant through its agents and servants, the conductor or brakeman, knew or ought to have known that the plaintiff was, at the time the conductor gave the signal to start, upon the train otherwise than as a passenger outward bound. There was therefore no negligence in starting the train. The case in this respect is ruled by *Griswold v. C. & N. W. R. Co.* 64 Wis. 652, 26 N. W. 101. So that, even conceding appellant's contention that plaintiff was rightfully on the train by customary invitation and that defendant owed her the duty of ordinary care, still there was no want of ordinary care within the general rule first herein stated. It follows that the judgment of the circuit court must be affirmed.

By the Court.—Judgment affirmed.

BROTZKI, Respondent, vs. WISCONSIN GRANITE COMPANY, Appellant.

March 15—April 5, 1910.

Master and servant: Injury to blaster by premature explosion: Assumption of risk: Obvious dangers: Duty to give warning.

1. A servant assumes the risks ordinarily incident to his employment which are so obvious that he is presumed to know of their existence.
2. A master is not bound to give warning of open and obvious dangers to a servant of ordinary intelligence, knowledge, and experience.
3. An employee of ordinary intelligence who had worked in a granite quarry for a number of years as a driller, for two years as helper to a blaster, and for one year as a blaster, must be presumed to have had knowledge of the open and obvious dangers incident to the operation of blasting as it was customarily performed, whether arising from the nature of the business, the particular manner in which it was conducted, or the use of defective or insufficient appliances.
4. Such an experienced blaster presumably knew the nature and condition of the blast holes as to roughness of the sides and sharp projections of the rocks in the holes, and was chargeable with knowledge that his use of a steel gauge rod in loading the holes might produce a spark by contact with the rock and so cause a premature explosion.
5. The fact that such blaster had no knowledge of the process and dangers of blasting except what he had acquired while at work in the quarry does not relieve him from the consequences of his assumption of such risk of premature explosion, it being a risk which he must be held to have apprehended and understood.

APPEAL from a judgment of the circuit court for Green Lake county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

The plaintiff brings this action to recover for personal injuries received on May 28, 1908, by an explosion of blasting powder in defendant's granite quarry.

The defendant owns and operates several granite stone

quarries, and the injuries were received in one of these quarries at Berlin, Wisconsin. There is a blaster for each of the three pits of this quarry, and the plaintiff was the blaster in one of them at the time of the injury.

Plaintiff was thirty-six years of age. About fifteen years before he received his injuries he had taken up his residence in Berlin. Thereafter he worked on a farm for about a year and then went to work for the defendant. At times he had done other work, but at the time he received his injuries he had worked for the defendant about nine years altogether. He started work as a driller and worked in other quarries as such, and had done a little blasting in one of these quarries. For one year prior to the time he was injured the plaintiff had been the blaster in his pit, and for two years or more prior thereto he had been the blaster's helper. During this time, as helper, he had assisted in loading and firing blasts, and he thus became familiar with the way in which the blaster performed his work. When the blaster was away he did the blasting.

Preparatory to the blasting proper, holes are drilled into the rock from eighteen inches to fourteen feet or more in depth. In drilling a deep hole, a kit of drills, eight or nine in number, is used. As the hole becomes deeper, each succeeding drill is a little smaller than the preceding one by about one sixteenth of an inch, and a hole twelve or fourteen feet deep will be about three inches in diameter at the top and about an inch and one-half at the bottom. The blaster examines the hole which has been drilled, using a steel rod about half an inch thick and of a length depending on the depth of the hole. One end of this rod is bent into a ring; the other end is flattened and notched on the end. If the blaster finds water in the hole he removes it with a pump if necessary. If only a small quantity is in the hole he removes it by means of a rag which is put through the ring at one end of the steel rod and acts as a mop when the rod is thrust into

the hole. When the hole has been dried the blaster pours a handful or two of sand into the hole to absorb any water remaining at the bottom and to keep the powder dry when poured into the hole. If several charges are exploded in the same hole, the layer of sand poured into the hole by the blaster is designed to cover any smoldering damp powder which may be left in the hole and thus prevent the premature explosion of a subsequent charge. The notched end of the steel rod is used to remove projections or irregularities existing in the hole or which may be caused by the discharge of a blast.

The blaster then inserts a measuring rod, which rests upon the sand at the bottom of the hole; a chalk mark is made upon the rod at the surface level; and the top end of the rod is held in the hand of the blaster while powder is poured into the hole with the free hand. As the powder runs into the hole the blaster gradually lifts the rod and moves it about, thus determining whether the powder is resting on the bottom of the hole and rising therein, or whether it is running away through crevices, and also ascertaining, from the rising chalk mark on the rod above the surface, the height of the powder in the hole. When sufficient powder has been placed in the hole the blaster inserts an exploder. The exploder, or loaded cartridge, is about one quarter of an inch in diameter and a little more than an inch long. Two wires are connected with the exploder and these are connected with the wires of an exploding battery. The exploder is placed in the notched end of the measuring rod and held in place by the blaster keeping taut the two wires, one on either side of the measuring rod. The rod is then thrust down the hole and the exploder thus placed upon the surface of the powder. After the exploder is in its proper position in the hole sufficient powder is poured into the hole to cover the exploder. Sand and dirt are then run and packed into the hole, and the blaster and his helper then go to the battery, which is sta-

tioned at a safe distance from the hole, turn on the electric current, and the explosion results. The loading and exploding are repeated until the rock is dislodged or broken loose. It is the duty of the helper to stand by and hand the blaster the tools and materials as needed.

The plaintiff, as stated, had worked in the quarry of the defendant for about nine years. He had worked as blaster for the year immediately preceding the time he received his injuries and for two years theretofore as helper to the blaster. As such helper he had observed the blaster at work and had become familiar with the blaster's way of performing his work. He, as helper, handed to the blaster the steel rod for gauging, probing, and smoothing the hole, and the powder and the exploder, as called for, and, when told so to do, turned on the current at the battery, or lighted the fuse when the blast was so exploded. The blasting was usually done during the noon hour or after the other workmen had quit work in the quarry and when the blaster and his helper were alone. The helper received no instructions as to the process except such as he received and learned by doing the work and from observation. He was given no specific warning as to the dangers incident to blasting and knew of them only as his experience, knowledge, and observation informed him.

The superintendent requested the plaintiff to take charge of the blasting when the blaster with whom he had been working as helper quit work, and upon plaintiff expressing doubt of his fitness to handle the work he was assured by the superintendent that he knew all about the work and that the knowledge he had obtained from his experience and observation of the former blaster qualified him to do the work all right. In undertaking the work the plaintiff did the work as it had been done by the former blaster and he used the same tools.

Plaintiff was injured shortly after 6 o'clock in the evening. The hole at which he was working was about twelve feet

eight inches deep, a trifle slanting. He had pumped the water out of the hole and discharged a blast. The charge blew out, and no rock was loosened so that it could be used for quarrying purposes, and the plaintiff went back to the hole to recharge it. He put the steel rod down into the hole to probe it, and on withdrawing it found that it was nice and dry. He threw a handful or two of sand into the hole and then took from his helper a cup of powder to pour into the hole. He held the steel gauge rod lightly in one hand, resting it upon the powder in the hole. He poured about three quarters of the powder into the hole, the helper standing back of him ready with the exploder. While thus gauging the charge the plaintiff felt the rod catch. He turned and lifted the rod, which seemed a little tight, and when he so lifted and turned it the powder exploded and the burning powder and gas shot up from the hole and injured him. He testifies that he held this rod by gripping it between his thumb and two fingers, and that he gave it a slight lift and a turn just before the explosion. Plaintiff's hand was burned, his upper lip was torn away, his face was burned, and he lost the sight of both eyes. His nostrils were injured, and in healing have become drawn together so that plaintiff has difficulty in breathing and is often compelled to insert a tube to enable him to breathe through them. His face and hands are scarred.

Plaintiff alleges that he was ignorant of the dangers incident to the use of this steel gauge rod in the operation of blasting; that he had not been instructed as to the safe way of performing the work; that he had not been warned that sparks were likely to be emitted if a steel gauge rod was used in contact with granite; and that the explosion resulted from a spark which was caused by the friction of the hard steel against the rock on the side of the hole. It is claimed that the explosion would not have occurred if the plaintiff had

been furnished with a wooden or copper rod with which to place and gauge the powder in the hole.

The evidence as to whether it was customary to use a wooden or soft metal rod for placing the powder and exploder in position was in conflict. There was evidence that the explosion might be due to the friction upon the powder between the rod and the rocky side of the hole, that it might have been caused by smoldering damp powder in the hole, or because the hole was overheated; and there was also evidence that an explosion due to the friction upon the powder between the side of the hole and the rod might have occurred even if a wooden rod or one of soft metal were used.

The court denied a motion for judgment in defendant's favor. The jury returned a verdict finding that the explosion was set off by a spark caused by the friction of the steel rod against the rock; that the steel rod was not a reasonably safe gauge to use in determining the height of the powder in the hole; that it was defendant's duty to warn the plaintiff of the danger incident to the use of the steel rod as a gauge; that the failure to furnish a reasonably safe gauge and the defendant's failure to warn the plaintiff of this danger were the proximate cause of the plaintiff's injury; and that the plaintiff was not guilty of contributory negligence. The jury found the amount of damages to be awarded. This is an appeal from the judgment on the verdict.

For the appellant there were briefs by *Stewart & McDonald,* and oral argument by *F. C. Stewart.*

For the respondent there was a brief by *W. E. Cavanaugh* and *Bouck & Hilton,* attorneys, and *John F. Kluwin,* of counsel, and oral argument by *Mr. Kluwin* and *Mr. Cavanaugh.*

SIEBECKER, J. From the above detailed statement of the case it is apparent that the defendant had always conducted

its quarry business, including the operation of blasting, in the manner in which it was being conducted at the time the plaintiff was injured by a premature explosion, and that it had always used steel gauge rods in loading the blast holes with powder, as was done by the plaintiff on this occasion. There is evidence tending to show that the use of such steel gauge rods is liable to cause sparks to be emitted through friction produced by contact of the steel rod with sharp projections of the rock on the sides or walls of the blast holes, and that this danger does not exist when wooden or copper gauge rods are used. The court awarded a recovery upon the ground that the steel gauge rod furnished by the defendant to plaintiff to do this blasting operation was not a reasonably safe appliance, and that the defendant was negligent in not warning the plaintiff of the dangers incident to so using such a rod in the performance of his duties. There is no controversy that the defendant had the legal right to use this steel gauge rod as it did in conducting its business of blasting, and that this in itself did not make it liable to the plaintiff, though this constituted negligence in the manner of conducting its business. The law is well established that a servant assumes the risks and dangers ordinarily incident to his employment if they are so obvious that the servant is presumed to know of their existence, and that the master is not required to warn a servant of ordinary intelligence, knowledge, and experience of such dangers. This rule is aptly stated in *Dahlke v. Ill. S. Co.* 100 Wis. 431, 76 N. W. 362, as follows:

"The duty to instruct does not go so far as to require the master to acquaint the employee with every possible danger to which he may be subjected in the course of his employment. The master has a right to assume that the servant will see and appreciate those dangers which are open and obvious to a person of ordinary comprehension."

Dougherty v. West Superior I. & S. Co. 88 Wis. 343, 60 N. W. 274; *Faber v. C. Reiss C. Co.* 124 Wis. 554, 102 N. W. 1049; *Rahles v. J. Thompson & Sons Mfg. Co.* 137 Wis. 506, 118 N. W. 350, 119 N. W. 289.

The rule applicable to a state of facts like those of the instant case is stated in another case as follows:

"The servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and, while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions." *Leary v. B. & A. R. Co.* 139 Mass. 580, 2 N. E. 115.

The inquiry, then, is: Did the plaintiff assume the risk from dangers incident to defendant's neglect in furnishing him with a steel gauge rod for performing the operation of blasting in the quarry? As above stated, this danger is alleged to arise from sparks produced by friction when the steel rod comes into contact with the rock on the sides of a blast hole. It appears that the plaintiff is a man of average intelligence, that he had worked in the quarry business for a number of years as a driller, and that he had worked two years as a helper to the blaster and for one year as blaster. Knowledge of and skill in blasting are shown to be acquired by observing how the work is done by the experts in the business, by helping them, by doing the work personally, and by observing the operation and the results of blasting. The plaintiff had had experience in all of these respects to the extent stated. We must therefore conclude that he was an expert and experienced blaster, and, as such an expert, he must be presumed to have had knowledge of such open and obvious dangers, incident to doing blasting, as such a skilled person of ordinary intelligence, knowledge, and experience

possesses, "whether they arise from the nature of the business, the particular manner in which it is conducted, or the use of defective or unsafe appliances." There is no evidence tending to show that the plaintiff had not capacity to understand the character of the dangers incident to the operation of blasting, or that he did not comprehend and understand the operation of the natural laws regarding the production of sparks by friction through a contact of this steel rod and the granite rock. These are the dangerous conditions of which the plaintiff alleges that he had no knowledge and which he claims were so hidden and concealed in their operation that he, as blaster, ought not to be held to have assumed the risk of injury from them while performing his duties. All the conditions surrounding the plaintiff at his work, aside from the use of the steel rod, are those which accompany and arise in the usual and ordinary method of doing blasting in granite quarries and commonly attend the work, and he must therefore be presumed to have had knowledge of them. It therefore follows that the plaintiff presumably knew the nature and condition of the blast holes as to roughness and unevenness of the sides or of sharp projections of the rocks in the walls, and, knowing them, he was, under the circumstances, charged with the knowledge that his use of a steel rod like the one used on this occasion might produce a spark by contact with the rock. It thus appears that the danger complained of is the result of known and obvious conditions and the operation of natural laws. We do not perceive how this can, under the surrounding conditions, be said to be a secret and unknown danger which an intelligent and experienced blaster does not comprehend. The very nature of his expert information tends to impart this knowledge and thus inform him on this subject. It is probable that such expert blasters have more knowledge concerning the art and a better comprehension of such dangers as are here complained of than the employer, who is held to a full

knowledge of the subject in the conduct of his business. We are constrained to hold, upon the facts proved and the rule of law applicable thereto, that the plaintiff's injuries resulted from risks and hazards which attended obvious and known dangers incident to the manner of conducting the blasting operations in which he was engaged. The fact that the plaintiff had no knowledge of the process and dangers of blasting except what he had acquired while in defendant's employ and at work in its quarry does not relieve him from the consequences of his assumption of this risk, since it was one which he, under the circumstances of the case, must be held to have comprehended and understood. *Dougherty v. West Superior I. & S. Co.* 88 Wis. 343, 60 N. W. 274; *Rahles v. J. Thompson & Sons Mfg. Co.* 137 Wis. 506, 118 N. W. 350, 119 N. W. 289; *Leary v. B. & A. R. Co.* 139 Mass. 580, 2 N. E. 115.

In this view of the case it is not necessary, for a final determination of the case, to consider other questions raised on this appeal. We will, however, add that after a careful examination of the evidence we are persuaded that the proof is insufficient to sustain the jury's answer to question 1 of the special verdict, finding that the explosion which injured the plaintiff was set off by a spark caused by friction of the steel rod against the rock in the walls of the blast hole. A discussion of the evidence on this point is not required in view of the conclusion that the plaintiff has no cause of action on the grounds above stated.

By the Court.—Judgment reversed, and the cause remanded to the trial court with directions to dismiss the complaint.

TIMLIN, J., dissents in part.

JOSEPH, by guardian *ad litem*, Appellant, vs. BAARS, Respondent.

March 15—April 5, 1910.

Slander: Privileged communications: Conditional privilege: Burden of proof: Good faith: Malice.

1. In an action for slander when, to establish the defense of qualified or conditional privilege, the defendant has shown *prima facie* that the slanderous communication was made by him to the proper officer of the law (or one honestly believed by him to be the proper officer) in good faith, believing the communication to be true and acting simply from a sense of public duty, the burden of proof is not upon him to show further that he had reasonable grounds for believing the truth of the communication.
2. Mere reckless statements, or statements based on nothing in the way of information, cannot be said to have been made in good faith within the meaning of the above rule.
3. When a *prima facie* case of privilege has been made as above stated the burden is upon plaintiff, as in other cases of communications conditionally privileged, to prove actual malice on the part of the defendant.

APPEAL from an order of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Slander. The complaint contains two causes of action. The first alleges that the defendant falsely charged in the presence of two persons named that one K. had had sexual intercourse with the plaintiff (a girl sixteen years of age), and the second alleged that the defendant made the same charge on another occasion by telephone to one Tarnutzer. The defendant by answer alleged the truth of the statements, and as a separate defense to the second cause of action alleged that Tarnutzer was the village marshal of the village of Prairie du Sac, and that he (defendant), having found plaintiff and said K. in bed together having intercourse, telephoned the fact to said Tarnutzer believing him to be an

officer of the law authorized to make arrests for crime, solely for the purpose of procuring the arrest of said K. and without malice toward the plaintiff. The case was tried by jury and a general verdict for the plaintiff fixing her damages at $500 was returned. Upon motion the court set aside the verdict and granted a new trial on the ground of error in the charge, and the plaintiff appeals from the order.

For the appellant there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

William Ryan, attorney, and *D. H. Grady,* of counsel, for the respondent.

WINSLOW, C. J. The trial judge granted a new trial because he thought he had given an erroneous instruction to the jury with regard to the defense of conditional privilege. He charged the jury that in order to find for the defendant on the ground of privilege they must be "satisfied by the preponderance of the evidence that the defendant spoke to Tarnutzer in good faith believing him to be a constable with the authority and charged with the duty of instituting a criminal prosecution and apprehending persons committing crimes, *with reasonable grounds for believing the man K. guilty of a criminal act of sexual intercourse,* and believing him to be so guilty, and believing said statements to Tarnutzer to be true, for the sole purpose of having a criminal prosecution instituted against K. and having him arrested for such act." The particular clause which the trial court thought erroneous is the clause which requires the defendant to prove *that he had reasonable grounds for believing K. guilty* in addition to proving that he actually did believe him guilty.

Upon this question the trial judge's second thought seems to us to have been correct. The defense of qualified or conditional privilege based on the communication of the facts regarding a supposed crime to an officer of the law merely from a sense of public duty and without malice is an affirma-

tive defense, which, like other affirmative defenses, must be proven by the defendant by a preponderance of the evidence if the facts do not appear in the plaintiff's case; that is, the defendant must show that he spoke the slanderous words to an officer of the law charged with the power or duty to arrest or prosecute (or one whom he honestly believed to be such officer) in good faith believing his communication to be true and acting simply from a sense of public duty. As briefly stated by Lord COLERIDGE in *Padmore v. Lawrence*, 11 Ad. & El. 380, 382:

"For the sake of public justice, charges and communications which would otherwise be slanderous are protected if *bona fide* made in the prosecution of an inquiry into a suspected crime."

There must be good-faith belief in the fact that a crime has been committed and good-faith belief that the person to whom communication is made is a proper person or officer with whom the information should be lodged to the end that justice should be vindicated. When the defendant has shown these two facts he has undoubtedly lifted the burden of proof. He has then shown *prima facie* at least that his communication was made in the course of duty, from a sense of duty, and with an honest belief in its truth. He is not required to go further and show that a shrewder man would have discovered the falsity of the supposed facts. The question is: Did he honestly believe what he said to be true? not whether some other man placed as he was would have believed it. Odgers, Libel & S. (4th ed.) p. 330. His belief must of course be founded upon some information. Mere reckless statements, or statements based on nothing in the way of information, are not protected, because they cannot be said to have been made in good faith; but statements honestly believed to be true, based upon some tangible information and made from an honest desire to promote public justice, and made to the proper officer or one honestly supposed

to be the proper officer, are protected, though some more prudent person would not perhaps have believed in the truth of the information on which the statement is based. *Clark v. Molyneux,* L. R. 3 Q. B. D. 237, 248. When the *prima facie* case of privilege has been thus made by proof that the communication was made in the course of public duty, from a sense of public duty, and with an honest belief in its truth, it becomes the duty of the plaintiff, as in other cases of communications conditionally privileged, to prove actual malice by some facts tending to prove a malicious or guilty motive. *Calkins v. Sumner,* 13 Wis. 193; *Hemmens v. Nelson,* 138 N. Y. 517, 524, 34 N. E. 342; *Dale v. Harris,* 109 Mass. 193; 8 Ency. of Ev. 220.

It is argued by appellant that because the defendant's information in the present case was derived only from things which he himself saw or thought he saw, and because the jury have found by their verdict that the supposed crime was not in fact committed, there is no room for the defendant to claim good-faith belief in the truth of his communication; or, in other words, the claim is that he must have known the communication to be false and hence that it could not be privileged, and no error in the instructions upon the question of privilege can be prejudicial in the least. It is sufficient to say with reference to this claim that under the evidence in the case we regard it as entirely possible that the defendant may have believed that the charge he made was true and founded such belief in good faith on certain very compromising facts which, upon the undisputed evidence, came within his vision, and yet the charge may not have been true. It is not deemed edifying or necessary to spread upon the record any specific or detailed statement of the evidence to which we refer.

By the Court.—Order affirmed.

STATE EX REL. CRAIN, Appellant, vs. ACKER, Respondent.

March 15—April 5, 1910.

Elections: Ballots, when to be counted: Irregular marking: Intent: Question for jury.

1. A ballot marked in such a manner that the intent of the voter can be gleaned therefrom should be received and counted so as to effectuate that intent.
2. In *quo warranto* proceedings the question as to the intent of voters in marking their ballots in a certain irregular way is for the jury if, from the ballots themselves in connection with the extrinsic facts in regard to the situation, any reasonable mind might, by legitimate inference, ascertain such intent.
3. Subd. 3, sec. 57, Stats. (Laws of 1907, ch. 583), is of no assistance in determining the intent of a voter in placing a mark upon the ballot in the same space with the printed names of two candidates, but opposite a blank line left for individual nominations.
4. From a mark so placed no intent to vote for either of the two candidates whose names are printed can be inferred, especially where knowledge of the proper method of voting is shown by other portions of the ballot.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action in the nature of *quo warranto* between rival candidates for the office of county superintendent for Fond du Lac county at the election held April 6, 1909. After some amendment of pleadings the action was transformed into a recount of all ballots cast, whereby respondent was found to have a majority of sixteen of concededly valid ballots. There remained forty ballots of which the printed form and marking as to county superintendent were as follows:

For County Superintendent of Schools.	Vote for one. RUBY M. ACKER, A Non-Partisan Superintendency.....☐ EDWARD P. CRAIN, A Non-Partisan Superintendency.....☐ .....☒

The relator claimed count of said ballots for himself. Each party moved for direction of a favorable verdict. Respondent's motion was granted and verdict directed in her favor, whereon judgment was rendered, from which the relator appeals.

For the appellant there was a brief by *D. F. Blewett* and *Duffy & McCrory,* and oral argument by *J. H. McCrory.*

For the respondent there was a brief by *Maurice McKenna* and *T. C. Downs,* and oral argument by *Mr. McKenna.*

DODGE, J. The trial court was right in holding that the forty ballots above described were not necessarily to be disregarded or ignored merely because they were not marked in exact accordance with the directions of the statute. The constitutional right of an elector to have any reasonable expression of his intention in voting given effect is of the most sacred character, and no intent to thwart it can be ascribed to the legislature except upon unambiguous expression. While such purpose has been found in modern ballot legislation of some of the states, it is not declared in our statutes, and a ballot marked in such manner that the intention of the elector can be gleaned therefrom should be received and counted so as to effectuate that intent. This purpose is manifest in the statute and has been declared by this court. Subd. 3, sec. 57, Stats. (1898), as amended by sec. 7, ch. 583, Laws of 1907; *State ex rel. Blodgett v. Eagan,* 115 Wis. 417, 91 N. W. 984; *State ex rel. Dithmar v. Bunnell,* 131 Wis. 198, 110 N. W. 177. The question, therefore, before the trial court was one of fact as to whether the several voters casting the questionable ballots intended to vote for the relator. That intent must be resolved from the ballot itself in connection with the extrinsic facts in regard to the situation so far as they throw any light upon the subject. If from those ballots so considered any reasonable mind might by legiti-

mate inference, as distinguished from mere guess or conjecture, ascertain such intent, the court's duty was to submit it to the jury. Such, therefore, is the question to be considered here.

The appellant cannot derive aid from subd. 3, sec. 57, Stats. (1898), as amended by ch. 583, Laws of 1907, which provides:

"If an electors shall mark his ballot with a cross-mark . . . or any other marks . . . within the square after, at the right of the name of any candidate, or at any place within the space in which the name appears indicating an intent to vote for such person, it shall be deemed a sufficient vote for the candidate whose name it is opposite."

This statute was first framed at a time when each name of a nominated candidate was required to appear upon a ballot in a space by itself separated from others by both vertical and horizontal lines, and, except that it evinces a legislative purpose that the intent of the voter may be ascertained if possible and given effect, it is of no assistance in guiding the court as to the intent of a mark not opposite any name upon a ballot like this, where the names of both candidates are in the same space. If this ballot has any authority in the statutes, they are in confusion. The mark here is as much within the space where the respondent's name appears as the appellant's, and the statute by that clause would as much require counting the ballots for one as the other unless there can be some inference of the voter's intent as a question of fact.

We are presented by the respondent with a number of cases from other jurisdictions in which ballots more or less similar have been rejected, but nearly all of them upon the ground that the statutes declared such ballots void either because the marking did not comply with the absolute statutory requirements or because it constituted a distinguishing mark such as the particular statute made fatal to the validity of

the ballot. They therefore are not of aid to us. In *People ex rel. Bantel v. Morgan,* 20 App. Div. 48, 46 N. Y. Supp. 898, however, where the ballot was marked with much similarity to those under consideration, it was held quite impossible to determine any intent of the voter save by merest guess or conjecture. An exactly similar ballot was held to justify an inference of intent in an opinion by the trial judge in *Louck's Case,* 10 Lanc. Law Rev. (Pa.) 228, with no discussion whatever; and in *Middendorf's Case,* 4 Pa. Dist. Rep. 78, the trial judge in an opinion held that a mark out of place indicated an intention to vote for one of several candidates, and drew the inference that the intent was to vote for the one nearest the mark. A similar view was taken by Judge HASTINGS of the Fourteenth judicial circuit of this state in an opinion certainly as persuasive to our minds as either of those of the trial judges in Pennsylvania. This seems to be the extent of discoverable reported judicial opinion on the concrete question of fact, and it is not very conclusive.

It is argued that the electors who marked these ballots must be presumed to have intended to vote for one or the other of the two candidates and that it is a just inference they intended to vote for the nearest name. But is there any presumption or legitimate inference that they intended to vote for either? Each voter placed his mark upon a blank line where if he had written another name it would have indicated an intent to vote for such third person. Why is it not as probable that he made the mark for that purpose and by omission or confusion failed to write the name? Such intent is within the possibilities as pointed out in *People ex rel. Bantel v. Morgan, supra.* Again, it is not beyond possibility that some or all of these electors chose this method of declaring their disapproval of both names printed upon the ballot. Respondent urges the probability of ignorance in the electors as to the exact method of placing their marks.

But this conjecture is met, in case of twenty-eight of the ballots, by the fact that each of those electors upon the same document evidenced complete knowledge of the proper method of voting by his marking of a candidate for state superintendent of public instruction—a fact deemed persuasive in *People ex rel. Bantel v. Morgan.* In view of all these circumstances, we have reached the conclusion that the trial judge was correct in his view that any deduction as to the intent of any, certainly of the twenty-eight voters, could rest on no reasonable inference, but only on conjecture, and that therefore it was his duty to withhold the question from the jury under authority of cases like *Musbach v. Wis. C. Co.* 108 Wis. 57, 84 N. W. 36; *Bakalars v. Continental C. Co.* 141 Wis. 43, 122 N. W. 721.

By the Court.—Judgment affirmed.

ANDERSON, Respondent, vs. SPARKS, Appellant.

March 16—April 5, 1910.

Automobiles: Negligence: Collision on highway: Contributory negligence: Questions for jury: Special verdict: Instructions to jury: Defects in form: Credibility of witnesses: Evidence: Self-serving declarations: Appeal: Harmless errors: New trial: Newly discovered evidence: Diligence: Damages.

1. One who, while driving an automobile at night, runs into a wagon which has been stopped on the proper side of the highway to permit him to pass, is guilty of negligence whether he struck the wagon by turning into it or by running on the wrong side of the highway.
2. Where one driving in a wagon on a dark night, in the middle of a highway having a traveled track eighteen feet wide with a ditch on each side, turned to the right as soon as he saw the lights of an approaching automobile and stopped, leaving plenty of room for it to pass without danger, and about a minute after he saw the lights his wagon was struck by the automobile, he was not

necessarily guilty of contributory negligence even if his wagon, when struck, was slightly over the center line of the highway; but the question was one for the jury.

3. Questions submitted for special verdict in such case, as to whether defendant used ordinary care in handling and running his automobile at the time he was approaching and met the plaintiff; as to whether his want of ordinary care, if found, was the proximate cause of the injury; as to whether any want of ordinary care on plaintiff's part contributed to the injury; and as to the damages,—accompanied by a proper charge to the jury, fairly covered the issuable facts, and it was not error to refuse to submit other questions as to evidentiary facts, such as whether the automobile at the time of the collision was running as far to the right of the highway as was practicable, and whether the wheels of the wagon were over the center line of the highway.
4. Defects in the form of an instruction, by which the jury could not have been misled, do not constitute prejudicial error.
5. An instruction as to matters to be considered by the jury in determining the credibility of witnesses, if correct as far as it goes, is not erroneous merely because it omits some matters which might properly be considered. If further or more explicit instructions are desired in such a case, they should be requested. *Schmitt v. Mil. St. R. Co.* 89 Wis. 195, distinguished.
6. In an action for personal injuries the admission of testimony of a witness that, shortly after the accident, he asked the plaintiff if he was hurt and that plaintiff complained about his knee and fingers, was not a prejudicial error.
7. In an action for injuries sustained when plaintiff's wagon was run into by an automobile, testimony of a witness that after the accident he and the plaintiff together examined the tracks which they thought were the automobile tracks, was properly admitted where the witness, although he used the pronoun "we," testified to what he knew and saw, and not to any declarations or narrative of the plaintiff.
8. A new trial asked on the ground of newly discovered evidence may properly be denied where there was a want of due diligence to discover such evidence.
9. An award of $250 for injuries to person and property caused by an automobile being negligently run into a wagon on the highway, is *held* not excessive.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This action was brought to recover damages occasioned by a collision between the plaintiff's horse and wagon and the defendant's automobile. The complaint alleges that on the 15th day of October, 1908, at about 7 o'clock p. m., the plaintiff was traveling in a wagon drawn by one gentle horse, the property of plaintiff, along a public highway known as the Columbus road, in the town of Lodi, Columbia county, Wisconsin, which highway is used by the general public for travel, and that at the time in question the defendant was the owner of an automobile and was traveling therein upon the highway mentioned; that when plaintiff saw the defendant's automobile approaching he drove to the right of the traveled track; that the defendant negligently and carelessly managed and drove his automobile, and by reason of the careless and negligent manner in which he drove and managed it ran into the plaintiff's wagon, thereby throwing plaintiff from said wagon, causing the injuries complained of. The defendant answered admitting the ownership of the automobile and that he was traveling therein at the time and place mentioned, and denying each and every other allegation in the complaint. The jury returned the following verdict:

"(1) Did the defendant use ordinary care in handling and running his automobile at the time he was approaching and met the plaintiff? *A.* No.

"(2) If to the above question you answer 'No,' then was the want of ordinary care thus found the proximate cause of the plaintiff's injury? *A.* Yes.

"(3) Was there any want of ordinary care on the part of the plaintiff that contributed to produce his injuries? *A.* No.

"(4) What sum will compensate the plaintiff for the injuries he sustained? *A.* $250."

After verdict and before judgment the defendant made separate motions to change the answers to questions 1, 2, and 3 of the verdict, and for judgment in his favor on the verdict as so amended, which motions were denied and due excep-

tions taken. The defendant also moved for an order setting aside the verdict and for a new trial upon newly discovered evidence; also moved upon the minutes for a new trial, which motions were denied and due exceptions taken. Thereafter judgment was rendered upon the verdict in favor of the plaintiff and against the defendant, from which this appeal was taken.

For the appellant there was a brief by *Richmond, Jackman & Swansen,* and oral argument by *S. T. Swansen.*

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

KERWIN, J. It is urged by counsel for appellant that the court erred in refusing to change the answers in the special verdict on the ground that such answers of the jury are not supported by the evidence. We cannot agree with counsel in this contention, but, on the contrary, think the questions submitted upon the evidence were fairly jury questions. The Columbus road, upon which the accident occurred, extends in an easterly direction from the village of Lodi and is a much traveled public highway. The point of accident was about 250 feet east of the village limits, and the traveled portion at this point is about eighteen feet wide with a ditch on each side, there being also along the north edge of the traveled road a foot-path used by pedestrians. About 650 feet east of the place of accident the road ascends, and from that point to the village limits the view is unobstructed. North of the road and about 600 feet west from the place of accident is an electric light station, the light being suspended about twelve feet above the ground, but owing to the slope from the location of the light to the highway the light is about on a level with the highway. There were also other lights in close proximity to the highway. These lights had a blinding effect upon the defendant, who was traveling toward them at the time of the accident. The defendant was forty-

three years of age, was familiar with the highway and lights, and at the time in question was operating a two-cylinder Ford, ten horse-power machine going toward the village of Lodi, one Granat riding with him. The automobile had a wheel base of eighty-two inches, its width being of standard gauge about the same as a wagon, the hubs extending outside about three inches on each wheel. It was equipped with three lamps, but the one on the left nearest plaintiff was not lighted.

The evidence on the part of the defendant tends to show that at the time of the injury he was traveling on the north side of the highway and did not see plaintiff until he struck his wagon. The plaintiff was driving east from the village of Lodi with a democrat wagon and an old pony attached thereto. He had scantlings, boards, and some other articles in the wagon, the scantlings projecting back of the wagon box about eight feet. Plaintiff was familiar with the road and saw the automobile lights at a distance of between twenty and forty rods from the place of accident. When he saw the lights he drove his horse south as far as he could and close to the ditch and stopped, and the automobile struck him about a minute after he had stopped. The left wheels of the vehicles collided, the wagon wheel striking the axle of the automobile about six inches from the hub. The plaintiff was thrown out. His horse became detached and ran away. The defendant testified that the first he saw of plaintiff's rig was the reflection of the automobile lights upon the scantlings which projected beyond plaintiff's wagon box, and he estimates that the reflection was then about twenty feet away, the collision following almost instantly. The plaintiff testified that the defendant turned his automobile south and struck his wagon, and the defendant denies this. There is also some other evidence respecting tracks which were supposed to be those made by the automobile turning south at the place of accident, but this testimony is disputed by the

defendant, and it is claimed that such tracks were those of a wagon which passed shortly after the collision.

The only real controversy under this head is the place in the road where the collision occurred, the plaintiff contending that it occurred on the south side and the defendant insisting that it occurred on the north side. We have attempted to give only some of the leading points of the evidence, and shall not attempt to consider the proof in detail or the points made by counsel on each side respecting its weight and credibility, because we think upon the whole evidence the question was clearly for the jury. The jury was entitled to believe the testimony offered by the plaintiff tending to show that the collision occurred on the south side of the highway, and upon that theory the findings of the jury are clearly supported by the evidence. The defendant put in evidence a model of the automobile and also the lamp which was struck by the plaintiff's wagon wheel, and it is claimed that the dents in the lamp occasioned by the collision as well as the marks on the axle of the automobile where the wagon wheel struck it and the bent wagon tire clearly show that the collision could not have occurred by the automobile turning sharply south into the plaintiff's wagon. And, moreover, the plaintiff testified that he did not see the automobile turn. But the fact remains that the automobile did run into the plaintiff's wagon, and if the plaintiff was on the south side of the highway, as he testified, then clearly the defendant was guilty of negligence whether he struck the wagon by turning into it or by running too far to the south on the highway. We cannot think that the dents in the automobile lamp are very significant in determining whether the automobile was running at an angle or otherwise. But all of these questions were properly for the jury. There is nothing in the evidence rendering the plaintiff's testimony unworthy of belief. Nor can it be said to be against the physical facts appearing from the testimony or all reasonable probabilities. The

plaintiff's testimony is to the effect that the automobile did turn sharply south and struck his wagon, but that it turned so quickly that he did not see it. It is true that plaintiff may have been influenced in his idea that the automobile turned into him from an examination after the injury of the tracks which he supposed to be those of the automobile, and from their general course indicating that the automobile turned south and thus collided with the wagon. There is other evidence tending to show that the tracks, whether automobile or wagon tracks, where they curved south, were west of the point of collision, and therefore support the idea that they were wagon and not automobile tracks. But this is left somewhat indefinite in view of the fact that the wagon appears from the testimony to have been moved after the collision, first back, then ahead, but how far ahead does not appear.

Great stress is placed by counsel for appellant upon the fact that the evidence does not show that the plaintiff was on the south side of the highway. In this we think counsel is mistaken, but even if it be admitted that the jury found upon a different theory, namely, that the plaintiff was near the middle of the road, or even slightly north of the center, we think it was still a question for the jury whether the defendant was negligent and the plaintiff guilty of contributory negligence. It will be remembered that the evidence shows that the plaintiff stopped before the collision, and that the night was dark and the traveled track only eighteen feet in width. Now, it would be a question for the jury whether or not plaintiff was guilty of negligence under the circumstances and in the confusion of the moment with the automobile coming upon him, even if he stopped a little north of the center of the road. He might have deemed it advisable not to go too close to the south ditch, so that in the event of his horse shying or becoming unmanageable he would be able to prevent him from going into the ditch, es-

pecially in view of the fact that there was ample room north of him, even if he were slightly over the center line of the highway, to allow the automobile to pass without danger; and it is difficult to see, if the defendant was exercising ordinary care, how he could have run into plaintiff without seeing him, even if plaintiff were slightly north of the center line.

The court below, as expressed in its order on new trial, seems to have been of the opinion that the defendant was running too fast in view of the circumstances of the case, and that he should have kept his automobile under control so as to be able to have stopped within the reach of its lights. *Lauson v. Fond du Lac,* 141 Wis. 57, 123 N. W. 629. It also appears from the evidence that from the time plaintiff first saw the lights of the automobile, assuming that it was running six miles an hour as there is evidence tending to show, only about a minute would have elapsed before the collision. The plaintiff was in the middle of the road when he first saw the lights, and testified that he moved to the south, and from his testimony and other evidence in the case the proof is ample to support a verdict that he exercised ordinary care. But it is unnecessary to pursue this question further. It seems plain from the evidence that the answers by the jury to the special verdict are supported by the evidence.

2. Error is assigned on refusal of the court to submit as part of the special verdict the following questions:

"(1) Was the defendant's automobile, at the time of the collision, running as near the north edge of the highway as was practicable under the circumstances?

"(2) At the time of the collision, was the plaintiff's vehicle, or the north wheels thereof, on the northern half of the eighteen-foot strip?"

We think the special verdict submitted fairly covered the issuable facts, therefore there was no error in refusing to

submit the two questions requested, and this is especially so when viewed in connection with the charge. The first question asked was evidentiary in its nature and would have added nothing by way of specific finding upon the particular issuable facts. It was simply one of the elements of ordinary care, and would not, even if determined in favor of the defendant, have necessarily established ordinary care on his part under the peculiar circumstances of the case. The same may be said of the second question requested. If in the exercise of ordinary care under all the circumstances the plaintiff did not get wholly on the south side of the center of this narrow highway, but had his north wheel slightly over the line, still it would be for the jury to say whether or not he was negligent under all the evidence in the case. True, the evidence shows the plaintiff saw the automobile coming and he says he went as far south as he could; but even if he did not get as far south on the highway, or as near the southerly ditch in the moment of time which he had for deliberation, darkness of the night, and confusion of the situation, still it was for the jury to say whether or not he was negligent.

Under this head counsel for appellant relies upon several Wisconsin cases which we shall briefly consider. In *Rowley v. C., M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865, one of the specific charges and in fact the main charge of negligence was the negligent placing of a truct in a position so close to the track that it came in contact with the train, and the only question submitted was whether the railroad company was guilty of any want of ordinary care which proximately caused the injury. In the case before us the charge of negligence is "that the defendant negligently and carelessly managed and drove his said automobile, and, by reason of the careless and negligent way in which he so drove and managed said automobile, ran into the plaintiff's wagon, striking the front wheel of said wagon, thereby," etc. No

contributory negligence is charged in the answer. In *John Schroeder L. Co. v. C. & N. W. R. Co.* 135 Wis. 575, 116 N. W. 179, the real issue in the case was not fairly submitted to the jury. The same is true of *Reffke v. Patten P. Co.* 136 Wis. 535, 117 N. W. 1004. In *Steber v. C. & N. W. R. Co.* 139 Wis. 10, 120 N. W. 502, refusal to submit as part of the special verdict an inquiry as to whether or not deceased placed a signal on the track before he went to work, and whether it was in place when the car was switched on the track, was not error in view of the instructions given in the charge. In *Sufferling v. Heyl & Patterson,* 139 Wis. 510, 121 N. W. 251, the existence of the unsuitable hoist (a vital issuable fact) was charged in the complaint and denied in the answer. The court in considering the question held that trial courts are permitted to exercise a considerable measure of discretion in framing special verdicts. We think there was no prejudicial error in refusing to submit to the jury the questions requested. *Sufferling v. Heyl & Patterson, supra; Steber v. C. & N. W. R. Co., supra; Palmer v. Schultz,* 138 Wis. 455, 120 N. W. 348; *Zimmer v. Fox River Valley E. R. Co.* 118 Wis. 614, 95 N. W. 957; *Blankavag v. Badger B. & L. Co.* 136 Wis. 380, 117 N. W. 852; *Ryan v. Oshkosh G. L. Co.* 138 Wis. 466, 120 N. W. 264.

3. Error is further assigned on the charge respecting the contributory negligence of the plaintiff. The following is complained of:

"But the fact that the near wheel of the plaintiff's wagon was to the left of the middle of the road, if you find it was on such side, would not necessarily constitute a want of ordinary care on his part contributing to the injury."

Counsel claims this instruction was wrong on the facts of the case. It is true plaintiff testified that he saw the automobile coming when it was twenty rods from him, and that he was then in the middle of the road and turned to the south side. There is evidence that the automobile was over 600

feet from plaintiff when he first saw it and that it was going at the rate of six miles an hour. If going six miles an hour and 600 feet away it would take over a minute to reach plaintiff, and less than a minute if only twenty rods distant. But in any event, under the circumstances of the case, the court is of opinion that the question of contributory negligence was for the jury. The night was dark; the time for getting to the south side of the road and to a safe distance from the ditch was short. There is evidence that he at least made an effort to get as far south as was safe in view of all the circumstances, and it was for the jury to say, even if he failed to get south of the center before he was struck, whether he was guilty of negligence which contributed to the injury.

The following portion of the charge is complained of:

"You will answer this first question 'No' only unless the fact expressed by such answer is established to your satisfaction by a preponderance of the evidence. If such fact is not so established you will answer the question 'Yes.' "

A similar instruction was given with reference to the third question. The objection to these instructions is that the court should have told the jury that they "should not answer the first and third questions 'No' unless satisfied by a preponderance of the evidence that such answers expressed the fact." The jury could not have been misled by the instruction, although it might have been put in better form.

Error is also predicated on the following instruction:

"In determining credibility, you should consider the witness's apparent intelligence, candor, knowledge of the matters testified about, interest in the result of the trial, relations with the interested parties, corroboration by other credible evidence or proved facts or circumstances, the motives for falsifying, or the absence of these things or any of them, so far as their presence or absence appears from the trial, the manner and appearance of the witness upon the stand, the inherent reasonableness, or the absence of it, of the statements made, and any other facts or circumstances appearing

from the evidence or upon the trial tending to affect the question."

The objection to this instruction is that it failed to call the attention of the jury to witnesses' opportunity to observe what took place, the attention they paid to the occurrence, or their ability to recall and state it in its details correctly, and reliance is placed on *Schmitt v. Milwaukee St. R. Co.* 89 Wis. 195, 61 N. W. 834. But in that case the court was instructing regarding a greater number of witnesses on one side with a lesser number on the other, and told the jury that a greater number of credible witnesses on one side may be considered of more reliance and more worthy of confidence and trust than the testimony of a lesser number of witnesses of equal credibility. The rule of law laid down as applicable to the facts of that case does not apply here. In the case before us the charge was correct as far as it went, and if more explicit instructions were desired they should have been requested. *Larson v. Foss,* 137 Wis. 304, 307, 118 N. W. 804.

4. Error is assigned on the admission of evidence. One Peterson testified under objection that shortly after the accident he saw *Anderson* and asked him if he was hurt, and that he complained about his knee and fingers. It also appears that defendant was around there, probably seven feet away, but it does not appear whether he heard the conversation or not. This evidence was objected to as self-serving and its admission assigned as error. It is doubtful whether the evidence was admissible, but, even if not, we cannot see that it worked prejudice. It is also claimed that the admission of evidence of Peterson, to the effect that on the night of the accident he, in connection with plaintiff, looked the ground over and examined the tracks after the automobile—tracks which he thought were the automobile tracks—was error. It is insisted that the witness was merely describing the tracks that were pointed out by the plaintiff, hence the testimony was incompetent under the rule laid down by this

court. We will refer briefly to the cases cited on this point. In *Schillinger v. Verona,* 88 Wis. 317, 60 N. W. 272, the material question was as to where the plaintiff went over the embankment at a particular point, and a witness was permitted to testify under objection that the plaintiff pointed out the place where he went over the embankment. The evidence was corroborative of the plaintiff's evidence and its admission held error. In *Sorenson v. Dundas,* 42 Wis. 642, the respondent was permitted to testify to his own narrative respecting a meeting material to the issue which took place between the parties, and it was held that the respondent's narrative after the occurrence was not part of the *res gestæ* and not admissible. In *Prideaux v. Mineral Point,* 43 Wis. 513, it was held that, the injuries complained of having resulted from the overturning of a livery carriage in which plaintiffs were riding, the declarations of the driver to the owner of the carriage and team after his return to the stable without the injured person were not admissible in chief as part of the *res gestæ,* though admissible, upon proper foundation, to contradict the driver.

These cases are clearly distinguishable from the instant case. The witness Peterson did not testify to declarations or narrative of plaintiff. He testified to what he knew and saw. True, he used the pronoun "we" in speaking of what he saw. He said: "Well, it was the track that we thought would be the automobile track after the automobile." It cannot be said upon the evidence but that the witness was testifying from his own knowledge that the track which he examined was an automobile track.

5. Error is assigned in refusing a new trial upon the ground of newly discovered evidence. It is claimed that one Charles Brereton drove by the place of accident after it occurred with a wagon and load of hay, and that his wagon tracks showed his course up to the point where the automobile stood, and then turned south and passed the automobile.

The appellant by affidavits made a showing on the motion for new trial to the effect that this witness was material and unknown until after the last trial (there being two trials of this case below), and that he used due diligence without success to find him in time to use his evidence. On the other hand, it is claimed by respondent that the motion was properly denied (1) for want of diligence; (2) because the evidence if produced would be cumulative merely; and (3) that it would not in all probability change the result. The case was first tried below in December, 1908, and the second time in March, 1909. The court below, in denying the motion for a new trial on the ground of newly discovered evidence, placed its order on want of due diligence to discover the witness, and sets forth some grounds upon which the opinion is rested, and, further, that the evidence, even if produced upon another trial, would not in all probability change the result. *Conradt v. Sixbee,* 21 Wis. 383; *Grace v. McArthur,* 76 Wis. 641, 45 N. W. 518. The court also seems to have regarded the newly discovered evidence as cumulative. Whether the evidence is cumulative we shall not determine, but prefer to affirm the order upon the other ground stated by the trial judge, namely, want of due diligence in making search for the witness. *Edmister v. Garrison,* 18 Wis. 594.

It is also insisted that the verdict is excessive. We shall spend no time upon this point. The amount awarded by the jury was only $250. The plaintiff was thrown from his wagon and sustained some personal injuries, besides small damages to his wagon and tackle, and loss of time. We cannot say the damages awarded are excessive. The court is of opinion that no prejudicial error was committed, therefore the judgment should be affirmed.

By the Court.—The judgment is affirmed.

WINKLER, Respondent, vs. O'DONOVAN, Appellant.

March 16—April 5, 1910.

Counterclaim in tort action: Requisites: Oral demurrer.

In a tort action a counterclaim must arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or be connected with the subject of the action; and as against an oral demurrer this connection must appear from the counterclaim itself or from it and the complaint taken together, and cannot be shown by extrinsic evidence which has been offered by plaintiff in support of his case.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

James Murray, for the appellant, cited *Pelton v. Powell,* 96 Wis. 473, 71 N. W. 887; *Vilas v. Mason,* 25 Wis. 310; *McArthur v. Green Bay & M. C. Co.* 34 Wis. 139; *Gilbert v. Loberg,* 86 Wis. 661, 57 N. W. 982; *Collins v. Morrison,* 91 Wis. 324, 64 N. W. 1000; *Ainsworth v. Bowen,* 9 Wis. 348, and other cases.

For the respondent the cause was submitted on the brief of *C. E. Hooker.* He cited *Wood v. Noack,* 84 Wis. 398, 54 N. W. 785; *Scheunert v. Kaehler,* 23 Wis. 523; *Rowlands v. Voechting,* 115 Wis. 352, 91 N. W. 990.

TIMLIN, J. The plaintiff brought an action against the defendant, averring that plaintiff was the owner of an undivided one-half interest in seven acres of corn in the shock and four acres of corn in winrows, situate on the farm of defendant, and that defendant owned the other half interest; that plaintiff demanded that defendant divide the corn and deliver to the plaintiff one half of the same, which demand was refused; and that the defendant unlawfully, wilfully, and maliciously took, carried away, and converted to his own use said property. In addition to a general denial the answer contained a counterclaim which set up the execution by plaintiff and defendant of a written agreement or lease, a

copy of which was attached to the counterclaim, and averred certain breaches by the plaintiff of the covenants of said lease. It was not averred that the plaintiff claimed title to the corn in question under said lease or that said lease was in any way related to the demand of the plaintiff as pleaded by the latter. After appeal to the circuit court the cause was tried. The plaintiff put in evidence of his title to the corn, which evidence showed that he claimed it under this lease. The plaintiff having rested, the defendant offered evidence under his counterclaim, which upon objection by the plaintiff was rejected.

It is sufficient to say that the counterclaim did not on its face show that it arose out of the contract or transactions set forth in the complaint or that it was connected with the subject of plaintiff's action. Sec. 2656, Stats. (1898). This connection, necessary where the plaintiff's action is not upon contract, cannot upon oral demurrer to the counterclaim be supplied by extrinsic evidence, but it must appear on the face of the counterclaim, or from the complaint and counterclaim taken together.

By the Court.—Judgment affirmed.

KORTENDICK, Respondent, vs. TOWN OF WATERFORD, Appellant.

March 16—April 5, 1910.

Highways: Defects: Injury to horse: Notice of defect: Evidence: Sufficiency: Expert testimony: Special verdict: Instructions to jury: Immaterial errors.

1. A finding by the jury that the defendant town had actual knowledge of a defect in a highway before the accident in question is *held* to be sustained by the evidence.
2. Expert testimony alone may be sufficient to sustain a finding by the jury that pneumonia which caused the death of a horse resulted from a severe fall on the highway.

3. Testimony of a veterinary surgeon, qualified as an expert, that pneumonia might result from an injury sustained by a horse in falling upon a highway, was competent.
4. Where a question submitted for special verdict, "Was there a defect in the highway at the time and place in question?" was made definite and precise by instructions, so that the jury could not have been misled, it was not prejudicial error to refuse to submit in lieu thereof the question, "Did the hole described in the complaint exist in the highway, at the south side of the culvert, on the 28th day of March, 1904?"
5. Where the jury found that the defendant had actual knowledge of a defect in a highway in time to repair it, alleged errors in refusing requested instructions relative to nonliability for defects caused by the sudden action of the elements, or for latent defects, are immaterial.
6. Refusal of a requested instruction which would be proper if the verdict were a general one, but which is not germane to any question in the special verdict, is not error.
7. Given in connection with a question in the special verdict, "Was there a defect in the highway at the time and place in question?" a charge that "by a defect in the highway is meant any condition that renders the highway not reasonably safe for travelers who exercise ordinary care in traveling upon it," was correct and was not prejudicial because not qualified by phrases referring to negligence of the town or notice of the defect.
8. A charge that by the term "accident," as used in a special verdict, was meant "the infliction of the alleged injury to plaintiff's horse at the time and place in question," though not happily worded, was not prejudicial to defendant.
9. In an action for injuries alleged to have been caused by a hole in a highway, evidence as to the existence of other holes in the immediate vicinity of the one in question was competent upon the question of notice to the town.

APPEAL from a judgment of the circuit court for Racine county: A. J. VINJE, Judge. *Affirmed.*

Action to recover damages for the death of a horse, alleged to have been caused by an injury received through stepping into a hole in a highway. The jury found (1) that the highway was defective; (2) that the plaintiff's horse was injured by reason of such defect; (3) that the defendant had notice of the defect in time to repair the same before the accident;

(4) that the injury received was the proximate cause of the death of the horse; (5) that the plaintiff was not guilty of any want of ordinary care which contributed to produce the injury; (6) that plaintiff's damages were $122.50. From a judgment for plaintiff entered on this verdict the defendant appeals.

For the appellant there was a brief by *Kearney, Thompson & Myers,* and oral argument by *W. D. Thompson.*

For the respondent there was a brief by *William Sanders* and *Hand & Hand,* and oral argument by *E. B. Hand.*

BARNES, J. The following is a chronological history of this cause: Commenced in justice's court in September, 1905; verdict and judgment for plaintiff January 4, 1906, for $135 damages and $54.55 costs; appealed to the circuit court January 16, 1906; judgment of nonsuit in that court October 19, 1906; judgment reversed in this court March 10, 1908; second trial in the circuit court December 4, 1908, resulting in a verdict and judgment for plaintiff for $122.50 damages and $136.39 costs; appeal from the second judgment to this court in April, 1909; continued over the August, 1909, term by stipulation; March, 1910, case submitted to this court on briefs and oral argument at the bar. The record does not disclose whether or not the litigants or their ancestors came from Missouri. Be this as it may, a stern purpose is evinced to see that justice is administered as far as earthly tribunals are capable of dispensing it. The damages finally recovered are $12.50 less than those originally found. The costs are a mere incident anyway, and the wisdom of the fathers in providing that writs of error should never be abolished has been again vindicated. The judge of the Eleventh circuit, who resides in the extreme northwest corner of the state, presided at the last trial in the circuit court. Thus the cause was tried before a judge who was geographically farthest removed from the scene of the conflict, and who presumably

was as little liable to have any preconceived opinions or prejudices upon the merits or demerits of the case as any one who could be selected, unless some judge from a foreign jurisdiction were impressed into service. The case in itself was simple and involved the usual controverted questions in actions brought against towns for damages sustained by reason of alleged defects in highways. Nevertheless, it is argued that the trial judge, who we may confidently assume was entirely impartial, committed no less than nine reversible errors during the progress of a short trial.

1. It is urged that before the accident the defendant had repaired the defect testified to by plaintiff's witnesses, and that the fall of the horse was caused by a sudden and unforeseen breaking through of the crust as the horse stepped thereon, and that therefore there is no evidence to support the finding that the defendant had actual knowledge of the defect. It appears to us that there is a sharp conflict in the evidence on this point. Two witnesses, Fredrickson and Smatena, located a hole at the place where plaintiff's horse was injured. The pathmaster and the town chairman were notified of its existence about thirty hours before the accident. The pathmaster testified that after receiving such notice he examined the place and that the hole was a myth. He did find a little mud puddle on top of the rock culvert within a few feet of the alleged hole, which, according to his evidence, was entirely innocuous, but which he did repair. Another witness, George Best, testified that the hole was not in existence within less than an hour before the accident. If the evidence of plaintiff's witnesses referred to was true, then the hole which they found had not been repaired and had existed at least from the 25th of March to the evening of the 28th, when the injury occurred. A fair jury question was presented and the verdict is conclusive thereon.

2. It is next contended that the evidence is insufficient to warrant the jury in finding that the death of the horse was

a result of the fall occasioned by its stepping into the hole. The decision on the former appeal (135 Wis. 77, 115 N. W. 331) would seem to be *res adjudicata* on this point. There was evidence to support the finding. It is true it was expert testimony, but that would seem to be the only kind of evidence by which the cause of the animal's death could be established. A court which is not composed of horse doctors cannot say that such evidence is so fantastic as to be unworthy of any credence. The jury was as well qualified as is this court to decide whether the severe fall of the horse resulted in pneumonia.

3. The first question propounded to the jury was: "Was there a defect in the highway at the time and place in question?" The jury was instructed that by time and place was meant the evening of March 28, 1904, and at or near the culvert which has been testified to. The appellant asked to have the following question submitted in lieu of the foregoing: "Did the hole described in the complaint exist in the highway at the south side of the culvert on the 28th day of March, A. D. 1904?" The question submitted in connection with the instruction given thereunder was sufficiently definite and could not mislead or befog the jury. The evidence was more definite as to the precise location of the hole than was the complaint.

4. The fourth and fifth errors argued arise out of the failure of the court to give two instructions requested, covering the nonliability of the town for a defect caused by the sudden action of the elements unless a sufficient time elapsed thereafter for the town, in the exercise of reasonable diligence, to discover and repair it.

5. The sixth error argued arises out of the failure of the court to give a requested instruction to the jury to the effect that the town was not liable for latent defects in the highway not known to it and not discoverable by the exercise of ordinary care. These three alleged errors may well be consid-

ered together. It may be conceded that correct propositions of law are embodied in the requested instructions. But the jury found that the town had actual knowledge of the defect in time to repair it. In view of this finding the instructions became entirely immaterial. The last instruction requested might very properly have been given if the verdict were a general one, but was not really germane to any question in the special verdict.

6. It is next urged that the court erred in charging the jury that: "By a defect in the highway is meant any condition that renders the highway not reasonably safe for travelers who exercise ordinary care in traveling upon it." This definition of a defect is criticised in two respects: (1) Because there may be numerous defects in highways which render them unsafe for travelers in the exercise of ordinary care, but which are not defects in an actionable sense; and (2) because after the words "any condition" there should have been inserted the qualifying phrase "due to the negligence of the defendant." Clearly the first objection is not well taken. The court did not tell the jury that any defect in a highway might be made the basis of a claim for damages if it caused injury. He confined his definition to defects that left the highway in a condition in which it was not *reasonably* safe. This is the true test by which the negligence of a town is to be determined, assuming that the requisite notice of the defect, actual or constructive, is established. *Kawiecka v. Superior,* 136 Wis. 613, 616, 118 N. W. 192, and cases cited. Neither is the second point well taken. The instruction was given in connection with the first question in the special verdict, which simply dealt with the defective condition of the highway, regardless of whether the town had any notice of it or was liable if a defect in fact existed. The matter of notice was dealt with in another question. The interpolation would have been improper had it aimed at anything except the matter of notice.

Inasmuch as the subject of notice was covered independently of the first question, there was no necessity for referring to it directly or remotely in that question.

7. It is further contended that the court erred in charging the jury as follows: "By the term 'accident' is meant the infliction of the alleged injury to plaintiff's horse at the time and place in question." The criticism to this language is that the word "infliction" denotes and implies actual wrong. The definition is not happily worded, but is rather too favorable to the appellant. It should not be heard to complain of this, however.

8. It is next urged that it was error to permit the witness Best to testify to the existence of other holes in the highway in the immediate vicinity of the one in which the plaintiff's horse was injured. That this testimony was competent on the question of constructive notice is decided in *Spearbracker v. Larrabee,* 64 Wis. 573, 575, 25 N. W. 555. Other cases of substantially the same tenor and effect are *Shafer v. Eau Claire,* 105 Wis. 239, 243, 81 N. W. 409; *Weisenberg v. Appleton,* 26 Wis. 56; *McHugh v. Minocqua,* 102 Wis. 291, 78 N. W. 478. The opinion in the former appeal refers to this evidence, and treats it as being competent testimony (135 Wis. 80, 115 N. W. 331).

9. Lastly, it is suggested that the court erred in refusing to strike out the testimony of the veterinary surgeon, Williams, who testified as an expert that pneumonia might result from such an injury as the plaintiff's horse sustained in falling. The subject was a proper one on which to introduce expert testimony. The witness qualified as an expert and his testimony was competent even though it might not be convincing.

By the Court.—Judgment affirmed.

WHITEWATER TILE AND PRESSED BRICK MANUFACTURING COMPANY, Appellant, vs. BAKER, Respondent.

March 16—April 5, 1910.

Corporations: Fraudulent issue of stock: Pleading: Presumption as to overissue: Ratification: Recovery of par value: Accounting as to profits.

1. From allegations in a complaint that defendant subscribed and paid for ten shares of the stock of the plaintiff corporation; that acting with the other stockholders he fraudulently caused to be issued to himself certificates representing sixteen shares; and that he afterwards sold the additional six shares, for which he had never paid, it cannot be inferred that there was any overissue of stock, and therefore it must be assumed, on demurrer, that the six shares were legally issued except for the fact that they were not paid for.
2. Sec. 1753, Stats. (1898), does not preclude the sale of stock in part at least upon credit; and the word "void" as used therein does not mean incapable of validation, but stock issued in violation of that section may afterwards be validated by payment of full consideration therefor.
3. Where a subscriber for stock in a corporation fraudulently procures the issuance to himself of certificates for a larger number of shares than he has subscribed and paid for, the corporation may elect to ratify the transaction, treat the additional shares as validly issued, and sue to recover the par value thereof from him.

[4. Whether, when such subscriber is an officer of the corporation, he can be compelled to account for profits made by him on a sale of the fraudulently issued stock, over and above the par value, not determined.]

APPEAL from an order of the county court of Walworth county: JAY F. LYON, Judge. *Reversed.*

This is an appeal from an order sustaining a general demurrer to the plaintiff's complaint. The complaint alleged, in substance, that the plaintiff is a corporation duly organized by the filing of proper articles of organization May 4, 1903, with an authorized capital stock of $20,000 divided

into 200 shares of the par value of $100 each, more than fifty per cent. of which was subscribed and more than twenty per cent. thereof paid in; that the first meeting of stockholders was held May 16, 1903, and at such meeting the defendant *Baker* and George Gillen and Nim Johnson were elected directors; that thereafter the said directors elected *Baker* president, Johnson secretary and treasurer, and Gillen vice-president and manager of the corporation, all of which persons qualified and entered on their duties; that the business of the corporation is the manufacture of brick and tiles, and that real estate and machinery was purchased and manufacture begun; that the defendant subscribed for ten shares of stock, agreeing to pay $1,000 therefor, and that thereafter, on or about May 26, 1903, while still president and director, he with the other directors

"caused to be issued and delivered to himself certificates representing sixteen shares of the capital stock of said company, and that said stock was so issued to him in pursuance of a fraudulent plan or scheme whereby certificates of stock at least sixty per cent. in excess of the amount of stock paid for by them were issued to each of said directors and officers; that said defendant accepted stock certificates representing sixteen shares of the capital stock of the plaintiff corporation; that he paid for ten of said shares of stock $1,000, and that the stock of said corporation was then worth the sum of at least $100 per share, and that said plaintiff is informed and believes that said defendant has never paid any other consideration for said stock so issued to him except the sum of $1,000 as aforesaid."

The complaint further alleges that the defendant thereafter sold said stock for which he had never paid, and received therefor at least $100 per share; that the issuance of said stock certificates for sixteen shares was in violation of defendant's duty as director; that the profits made by defendant on the sale of said stock, amounting to $600, rightfully belong to the plaintiff; that plaintiff has demanded an ac-

counting of defendant and payment of such profits, but defendant has refused to account for or pay over the same. The prayer is for an accounting and judgment for $600, together with all other amounts received by defendant in violation of his duties as director of the plaintiff corporation, with interest on such sums from May 26, 1903.

For the appellant there was a brief signed by *Page & Ferris,* and oral argument by *J. W. Page.*

Edwin T. Cass, for the respondent.

WINSLOW, C. J. There is no express allegation that there was any overissue of stock, nor can that fact be legitimately inferred from anything stated in the complaint; therefore it must be assumed that the six shares of stock issued to the defendant were legally issued except for the fact that they were not paid for. The simple question presented, therefore, is whether the corporation may elect to affirm the transaction, treat the stock as valid, and sue the person who received the stock either for the par value or for the par value and the profits made by him on its resale.

As to the recovery of the par value at least, we can entertain no doubt. It is true that sec. 1753, Stats. (1898), forbids the issuance of stock "except in consideration of money or labor or property, estimated at its true money value, actually received by it, equal to the par value thereof," and provides that all stock not so issued shall be void; but this does not mean that every stock subscription must be paid in full before the subscriber becomes a stockholder, but only that the consideration paid or to be paid must be equal to the par value. The statutes contemplate that stock may be sold in part at least upon credit, and that the balance due may be called in from time to time, and even that such stock may be transferred and the original holder released from liability for the amount unpaid thereon. Secs. 1754, 1756, 1757, Stats. (1898); *Shannon v. Stevenson,* 173 Pa. St. 419, 34 Atl. 218.

This court held in *Haynes v. Kenosha E. R. Co.* 139 Wis. 227, 119 N. W. 568, 121 N. W. 124, that the word "void," as used in this section, did not mean incapable of validation, but that bonds issued in violation of the section could be thereafter validated by payment of full consideration therefor. The same reasoning applies with equal force to stock. If, therefore, *Mr. Baker* at any time before suit brought had paid for this stock it would have been validated. Such being the case, it is impossible to see why the corporation, after knowing the facts, might not elect to ratify the transaction (the stock not being an overissue), treat the stock as validly issued, and sue to recover what the defendant owes on the basis that the stock is valid. In such an action the defendant could not be heard to say that the stock was void simply because of his own wrongful act. He would be taking advantage of his own wrong. Nor does the case of *First Avenue L. Co. v. Parker,* 111 Wis. 1, 86 N. W. 604, lay down any different doctrine. That was an action against the bondsmen of a secretary of a corporation to recover the value of stock issued to himself without consideration and alleged to have been sold to innocent purchasers. There having been no validation of the issue of the stock by payment of its price or by action of the corporation, it was held that no injury to the corporation was shown, because the stock was void in whosesoever hands it was. The distinction between the two cases is manifest.

Whether the defendant, being an officer of the corporation, may be compelled to account for profits made by him upon his resale of the stock over and above the par value is a question which was not adequately argued and which we do not decide. On the facts stated he is liable for the par value at least.

By the Court.—Order reversed, and action remanded with directions to overrule the demurrer.

MILWAUKEE LIGHT, HEAT & TRACTION COMPANY, Appellant, vs. ELA COMPANY, Respondent.

March 16—April 5, 1910.

Railroads: Eminent domain: Nature of proceeding: "Suit:" Powers of court: Vacating award: Appeal: Discretion.

1. A proceeding under secs. 1845–1851, Stats. (1898), to acquire property by the right of eminent domain, is a suit in court, a judicial proceeding from the commencement to the end, except as to an appeal from the award; to that extent, it is in the nature of an ordinary action in court.
2. A proceeding as aforesaid being a suit, commenced by filing the petition, the court has all inherent power in respect thereto which it has, in general, respecting actions or suits in the nature of actions, including power to vacate the award of commissioners therein for improper conduct, or such conduct of parties.
3. A proceeding as in No. 1 being a suit in court, and not denominable as an action, or being such because commencible by the service of a summons, its statutory name is "a special proceeding," since all civil remedies under the Code are divided into ordinary actions or such proceedings.
4. Though the Code abolished the common-law distinctions between suits and actions and did away, entirely, with the name "suits" as the name of a class of judicial remedies, the essential character of such remedies has not been changed. A suit now is either an action or a proceeding in the nature of an action in court.
5. In vacating the award of commissioners in condemnation proceedings for improper conduct on their part, the court acts by virtue of its inherent power which stands by the side of and goes with, or without, the statute, where necessary in the due administration of justice.
6. The appeal allowable in condemnation proceedings is solely to review the honest judgment of the commissioners respecting compensation for property taken. It does not undo, directly, the wrong committed by improper conduct of commissioners such as would vitiate a verdict in a civil action.
7. The landowner is entitled to the fair judgment of the commissioners in condemnation proceedings, and to appeal therefrom if dissatisfied.

8. A motion to set aside the award of commissioners for improper conduct is addressed to the sound discretion of the court, and the result will not be disturbed on appeal unless it clearly appears to have been the result of abuse of discretion or mistake of law.

[Syllabus by MARSHALL, J.]

APPEALS from orders of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

In proceedings to acquire land by the right of eminent domain pursuant to secs. 1845 to 1851, Stats. (1898), after the commissioners filed their award respondent, as one of the property owners affected, to whom was awarded $764, moved the court, on affidavits and due notice to appellant, to set aside the report as to its land because of misconduct of the commissioners. The motion was granted and the entire proceedings of the commissioners as to such land were vacated and they were discharged as disqualified from further serving in the matter. There was proof tending to support the grounds for such order, which were, as follows:

(1) One of the attorneys for appellant, during the proceedings before the commissioners, treated one of them to intoxicating liquor.

(2) The hotel expenses of the commissioners during the proceedings before them were paid by appellant, or one of its attorneys, with its knowledge.

(3) The commissioners having agreed to award respondent $880, and duly prepared their report to that effect and delivered it to one of their number for filing with the clerk of the circuit court and knowledge thereof having come to one of appellant's attorneys, he discussed the same with a member of the commission, whereupon such member caused the report to be reconsidered and the award changed to $764.

(4) One of the commissioners communicated privately with a person not produced or sworn as a witness, from whom such commissioner secretly acquired information as to the value of the land, which he considered.

Upon the motion being brought on to be heard and moving affidavits read and arguments in support of the motion concluded, appellant's attorney requested an adjournment for ten days to enable him to produce counter affidavits. During the argument on such application, such attorney substantially admitted the claim made in the moving affidavits, specified in the court's first and second grounds aforesaid. Whereupon the court decided that, upon such admissions alone, the motion should be granted, and denied the application for a continuance. The order complained of was accordingly made.

The petitioner thereafter moved the court, on notice and affidavits, to vacate the order. The affidavits were to this effect: Neither the petitioner nor any one in its behalf promised to pay the commissioners' hotel expenses, in excess of the amount fixed by the court. The hotel proprietor was not directed by the petitioner, or any one in its behalf, to charge the hotel expenses to it or its attorney. Such attorney, on the hearing to vacate the award, admitted that on one occasion he purchased liquid refreshments for one of the commissioners, and that, possibly, the hotel bills might have been charged to the petitioner, but that they had not been paid; that the commissioners were informed that the hotel bills might be left unpaid until the close of the hearing, when a settlement would be made between them and the petitioner and the balance due them under the order of appointment would be paid; that upon the first hearing the attorney asked for a continuance because he had not sufficient knowledge, presently, to show the facts from petitioner's standpoint, and that the judge denied the application upon the ground that his admissions were sufficient to warrant granting the motion.

The commissioners acted upon their own judgment in making the award. The amount agreed upon at first was $880, but upon further consideration it was reduced to the smaller

amount, which was just. Petitioner's attorney at no time stated to the commissioners, or either of them, that $880 was too high, or what sum they should allow. He did, in the barroom of the hotel, openly entertain one of the commissioners with others. The hotel expense bills of the commissioners were charged to them respectively. The landlord was not informed that the petitioner would be responsible therefor.

The motion to set aside the order vacating the award was denied, it being recited in the decision that such motion was based upon the theory that the court was without jurisdiction to make the order sought to be vacated; that subsequently an appeal from the order of vacation was taken; that later, and some seven months after the motion was made and six months after the date of the appeal, such motion was heard, whereupon respondent raised the point that the appeal superseded the motion, filing a brief to support such contention, the petitioner declined to reply thereto, and thereupon the court ruled in favor of respondent, and dismissed the motion.

The petitioner separately appealed from both orders.

For the appellant there was a brief by *Louis H. Rohr,* attorney, and *Clarke M. Rosecrantz,* of counsel, and oral argument by *Mr. Rosecrantz.*

For the respondent there was a brief by *Gilbert, Jackson & Ela,* and oral argument by *Emerson Ela.*

MARSHALL, J. The most important proposition submitted for discussion and decision is, In condemnation proceedings under secs. 1845 to 1851, Stats. (1898), does the court have jurisdiction to vacate the award of the commissioners on account of their prejudicially improper conduct and discharge them as incompetent to further proceed? The proposition must be examined from the viewpoint of the nature of the proceedings, the express authority of the court therein, and its inherent power as well.

Sec. 1846, Stats. (1898), provides for the initiation of a condemnation proceeding by filing a petition in the office of the clerk of the circuit court having jurisdiction of the matter, praying for the appointment of commissioners by such court, or the judge thereof. The nature of the proceeding is indicated by the declaration in such section that "the filing of such petition shall be the commencement of a suit in said court." Being a "suit" in court from its initiation, the proceeding must, necessarily, continue to be a judicial proceeding in the nature of a suit in court until its termination by the filing of the award, or turned into an action in court by appeal from the award as provided in sec. 1849. Such section, in effect, provides that the appeal, as regards the subject involved, shall be considered a distinct proceeding in court with the characteristics of an action at law. So the proceeding must be in the nature of a judicial controversy in court of some sort from the beginning to the end. It is a judicial remedy, within the meaning of sec. 2594, Stats. (1898). In the broad sense, it is an action from the beginning, in that it is a judicial remedy for the enforcement or protection of a right, though it is not such, in the strict statutory sense, because it is not an "ordinary action" for that purpose commenced by service of a summons under sec. 2629, Stats. (1898). Only such are actions under sec. 2595, Stats. (1898). Not being, strictly speaking, an action under the Code and yet a judicial remedy denominated a suit, which in the broad sense applies to any proceeding in a court of justice by which a party pursues the remedy which the law affords for litigating a subject of controversy between adverse parties (*Kohl v. U. S.* 91 U. S. 367, 375; *Kuhl v. C. & N. W. R. Co.* 101 Wis. 42, 77 N. W. 155; *State ex rel. Durner v. Huegin,* 110 Wis. 189, 85 N. W. 1046), its statutory name must be a special proceeding, under sec. 2596, as every civil judicial remedy in a court of justice under the Code must have either the statutory name of a "civil action" or

a "special proceeding." Sec. 2594. Notwithstanding the common-law distinctions between actions and suits, as applied to legal and equitable remedies, are not known under the Code (sec. 2600), there may be many remedies in the nature of a civil action falling within the broad signification of suit as used in sec. 1846. Every civil remedy which is not known by the statutory characterization of an "ordinary action," where parties are arranged adversely in judicial proceedings, one to prosecute or enforce a right or redress or prevent a wrong, the other having opportunity to defend, is a proceeding in the nature of a civil action, and, generally, classible as a special proceeding. The final determination is in the nature of a final judgment in a suit or proceeding in the nature of a civil action. So it has been said that the abolition of common-law names has not and cannot change the essential character of judicial remedies. *State ex rel. Durner v. Huegin,* 110 Wis. 189, 223, 85 N. W. 1046. That applies to a purely statutory remedy when the legislature so manifests its pleasure by declaring that it shall be a suit.

The foregoing general treatment would sufficiently suggest the nature of the remedy provided for taking private property for railroad purposes by the right of eminent domain, even if the legislature had not seen fit to give it a name. In giving it the name of "a suit," which is unknown to the Code in the classification of remedies, the broad common-law meaning suggested must have been intended, contemplating existence in respect thereto of all the inherent power of courts of general jurisdiction in such matters, and such is the trend of previous decisions of this court.

In *Cornish v. M. & L. W. R. Co.* 60 Wis. 476, 19 N. W. 443, it was observed that the meaning of the term "suit" in sec. 1846 is that the proceeding shall be regarded from its commencement to the end as a special proceeding under the control of the court; that it is a suit by the party seeking to

take the land against the owner of the land and *in rem*. *Watson v. M. & M. R. Co.* 57 Wis. 332, 15 N. W. 468. Consistent therewith the statute provides, *first*, for a judicial hearing of the application for the appointment of commissioners on due notice to the adverse parties; *second*, for the appearance of incompetents, as in an ordinary civil action; *third*, for a judicial determination of the right to take and the extent of the taking; *fourth*, for the appointment of commissioners, regulating the time of hearing before them and limiting the time for them to perform their duty; *fifth*, for a hearing by the parties before the commissioners; *sixth*, for filing their determination in court; *seventh*, for a record thereof in the judgment book of the court; *eighth*, for enforcement of the judgment on one hand by the ordinary process for obtaining possession of land pursuant to a judgment of the court, and, on the other, for enforcement of the judgment by execution; *ninth*, for bringing in new parties and curing defects and informalities by amendment, as in case of judicial proceedings generally; *tenth*, for requiring notice to be given to any party at any time which in the sound discretion of the court may be thought proper; and *eleventh*, for appointing other commissioners in place of any who may die or refuse or neglect to serve, or be incapable of serving.

It would seem to follow, necessarily, that the court possesses the same inherent power over the award of the commissioners as it does over the determination of triers of fact in any judicial proceeding. That the circuit courts of this state under the constitution have very broad discretionary power to do things which may be deemed necessary or proper by the judicial head to guard the purity of the channels of justice, and that it includes, ordinarily, vacating the determination of triers of fact for prejudicial misconduct, does not need discussion. That it extends to dealing with an award of commissioners, as in this case, was held in *Matter of N. Y. C. & H. R. R. Co.* 64 N. Y. 60, overruling some previous de-

cisions in New York, upon which counsel for appellant rely. The holding in that case and others in jurisdictions where, unlike the statutory practice here, the award is required to be confirmed by the court, was not based on and did not have any reference whatever to that feature, as appellant's counsel seem to think. That is plainly indicated by this language from the opinion:

"The fallacy is in assuming that the Special Term, in vacating the prior orders, was traveling in the path of the statute. It was exercising its inherent power over the proceedings of the court to annul, vacate and set them aside, which power stands by the side of the statute and goes with it. After this was done, it entered again upon the way of the statute."

The supreme court of Michigan, after leaning to the idea of the early New York decisions, adopted the doctrine of the later one from which we have quoted. *Fort Street U. D. Co. v. Backus,* 103 Mich. 556, 557, 61 N. W. 787.

It should be noted that the Michigan court clearly negatived the idea that the authority to vacate the award is dependent upon the statutory requirement for confirmation of the report. It was put upon the broad ground of the court's inherent power to preserve the integrity of judicial determinations. The court said, in effect, that the power could be exercised in the proceeding for confirmation or a proceeding to set aside the report. There is abundance of authority to the same effect. Decisions in states going upon the ground that the proceeding, in contemplation of the statute, is not a judicial remedy, are of no consequence, since here it is such, as we have seen.

In *Douglass v. Byrnes,* 63 Fed. 16, it was taken for granted that judicial power existed to set aside an award in the circumstances of this case. The power was treated as being of the same nature and as broad, in such circumstances, as that to set aside the verdict of a jury for misconduct in

ordinary civil actions. The court said, in effect, that in case of misconduct of the commissioners even casting well grounded suspicion upon their impartiality, it is the duty of the court to set aside the award, not only as a matter of justice to the party injuriously affected, or possibly so, but in the interest of public justice.

It is suggested that the statute contemplates the appeal proceeding as the only one for a review of the award. That seems clearly unsound. There is no more reason for holding that the right of appeal is the only one open to the landowner in case of misconduct of the commissioners than is that such right is the only remedy in case of misconduct of triers of issues of fact in other civil suits. The appeal is a remedy for reviewing the result of judgment on the question of damages. It does not raise any other question. The landowner is entitled to the fair judgment of an impartial commission, and then to appeal therefrom, if he sees fit, to review such judgment. To hold that he may be bound by conduct of the commissioners which would render their determination absolutely void, or voidable, in an ordinary civil suit, leaving him only the expensive remedy of appeal, which would not test, at all, the good-faith character of the award, would be to take from him a statutory right and open the way to, if not invite, reprehensible and, in large measure, remediless conduct of parties and commissioners. It would remove the proceedings from the high character of the judicial plane to the lower level of irresponsible trickery and manipulation.

The remaining question is whether the ground for setting aside the report was sufficient. That does not call for a discussion as to whether, as an original matter, it appears that there was really prejudicial misconduct. The only question is whether there was such misconduct as to render it competent for the trial court, within its broad discretionary power, to set aside the report. In other words, whether there was

sufficient ground to preclude, on appeal, holding that the court abused its discretion.

The foregoing is sufficient to indicate that, not only must it appear that there was no very good ground for the trial court's action, but the ground must appear to be so trifling that there is no reasonable justification for the order complained of, else it cannot be disturbed. That calls for a very strong case in favor of appellant. Too strong a case, it seems, to be read out of the record in face of the conceded fact, that the attorney for the petitioner favored one or more of the commissioners by treating to intoxicating liquors, and the fact that the award, after being once agreed upon at $880 and the report completed and intrusted to one of the commissioners for filing, was recalled and the matter reconsidered, resulting in the award being very largely reduced, in connection with the sworn proof, which the court had a right to believe, notwithstanding it was denied under oath, that the report was recalled after the petitioner's attorney discussed it with one of the commissioners.

By rule of the common law a verdict of triers is liable to be set aside for their misconduct without regard to its being really prejudicial. Little attentions to the triers by parties, or in their behalf, liable to influence the "weak and facile" is of itself, by such rule, amply sufficient to warrant setting aside a determination by a jury. Many illustrations of that are given in *Douglass v. Byrnes, supra.* "Undue hospitalities or civilities" are effective as well as other and more immoral corrupting influences, and whether successful in accomplishing a prejudicial result or not. Thompson & M. Juries, § 348; Hayne, New Trial, § 48.

Doubtless the rigor of the common law has been very much softened by the spirit of the Code incorporated into sec. 2829, Stats. (1898), providing that "the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights

of the adverse party, . . ." though the policy of the common law to keep the channels of justice free not only from any taint of improper influence, but from any well grounded suspicion thereof, pervades the present system and is as forceful as ever and must ever so continue though, in deference to the "practical administration of justice" as commanded by the Code, doubtless some matters must be regarded as inconsequential now that would formerly have been so regarded. However, whenever it appears that methods have been resorted to, such as entertaining jurors or other triers, or giving them favors, or privately discussing with them the subject to be decided, for the purpose, actual or apparent, of influencing the decision, and which may probably have so resulted, it is within the power, and within the duty of the court to set aside the determination.

Speaking of such a situation in *Douglass v. Byrnes,* 63 Fed. 16, the court said:

"It is the duty of the court to set aside the report, in justice to itself, as well as to the petitioners, so that whatever proceedings may be had . . . shall be conducted impartially and fairly, and that the report of the commissioners, when filed, may be entitled to respect, and merit the confidence of the court that it is free from any bias or prejudice upon the part of any commissioner, and not clouded by misconduct of either of the parties. Litigants in courts of justice must learn, if they do not already know, that their interests cannot be promoted, upheld, or sustained by any conduct of this sort; and it is the duty of the court to let the general public know that such misconduct will not be tolerated in any case."

That was said in respect to a circumstance not as significant, it seems, as those in this case. This court, so far as it has been called upon to deal with the subject, has declared the same judicial policy. *State ex rel. Curtis v. Town Board,* 107 Wis. 1, 82 N. W. 550; *Shelby v. Miller,* 114 Wis. 660, 91 N. W. 86; *State ex rel. Dosch v. Ryan,* 127 Wis. 599, 106 N. W. 1093; *McMillan v. Fond du Lac,* 139

Wis. 367, 120 N. W. 240. The court is disposed to vindicate such policy upon all occasions, to the end that the channels of justice may be kept above reasonable ground for suspicion of being moved by improper influences and that parties litigant and the public as well may have the most perfect confidence in the honesty of courts and judicial agencies, and rightly attribute fallibility, which will be evidenced now and then so long as the court can only speak through human agencies, to error of judgment or something foreign to any element of moral turpitude.

It follows that the order setting aside the award of the commissioners must be affirmed and without necessary regard to the merits of such award. The recall of the report after the conceded occurrences and other circumstances, which it was competent for the court to believe, did take, or may probably have taken, place, were quite suspicious. The very material change in the award after the recall may well have convinced the trial court that it was its duty to vacate the award and discharge the commissioners, not merely that it was proper to do so.

What has been said is sufficient to indicate that the motion to vacate the first order was properly denied. Therefore, we need not specially discuss any question on the appeal from the second order.

By the Court.—The order setting aside the award of the commissioners and discharging them is affirmed, and the order denying the motion to set aside such first order is likewise affirmed.

MILWAUKEE LIGHT, HEAT & TRACTION COMPANY, Respondent, vs. BURLINGTON ELECTRIC LIGHT & POWER COMPANY, Appellant.

March 16—April 5, 1910.

Electric railways: Condemnation of land: Franchise to use streets: Pleading: Appeal: Presumptions: Necessity of taking: Rights of abutting owners in streets: Conditions precedent: Jurisdiction: Waiver of right to maintain appeal.

1. Where the petition in proceedings to condemn land for an electric railway states that "reference is hereby made" to a certain franchise granted by a city "to the same effect as though a certified copy were hereto annexed and made part hereof," and the record contains a certified copy of a franchise which both parties treated as the one referred to, the supreme court may, on appeal, ignore the informality in the pleading and consider the case as if the franchise were made a part of the petition.
2. Where a franchise granting the use of a street to an electric railway company required only that the track approximate the center of the street as near as practicable, with exception in favor of switches, turnouts, or side tracks which might be controlled by certain city officials, a construction of the road might be approved which would render reasonably necessary the taking of land abutting on the street; and on appeal from an order of the circuit court declaring the necessity of such taking, it will be presumed, in the absence of any bill of exceptions, that approval of such a construction was shown to the satisfaction of the court.
3. In proceedings to condemn land for an electric railway, failure of the petition to show the ability of the company to reach that particular point in its road does not render the petition insufficient.
4. A franchise granting the use of a city street is a condition precedent to the right of an electric railway company to condemn the rights of abutting owners in such street, and to the jurisdiction of the court to grant such condemnation.
5. A franchise granting merely the right to cross a street within the limits of another street cannot be deemed a permission to occupy any part of the first-mentioned street not within the crossing.

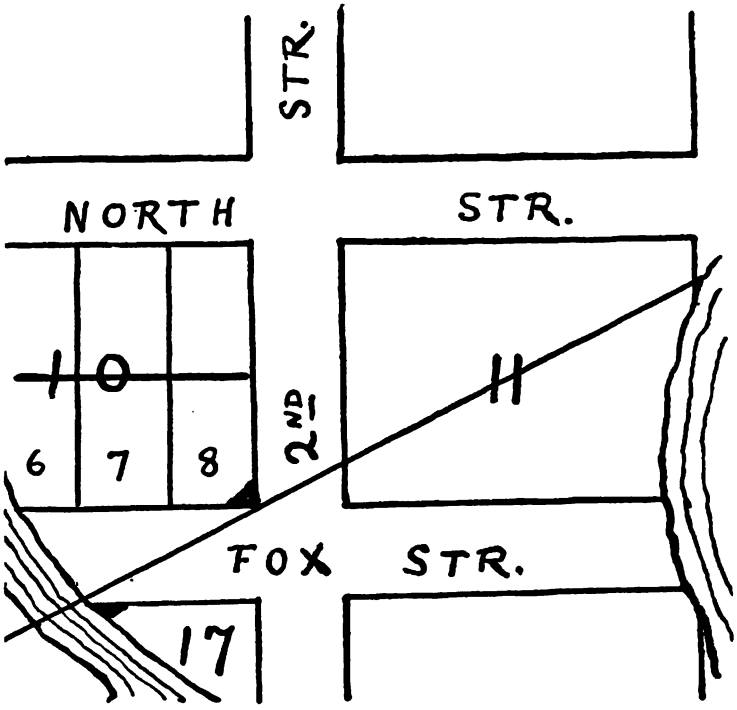
6. The fact that in proceedings to condemn land for a railway the owner joined in the litigation before the commissioners under an order declaring the necessity of the taking and appointing such commissioners, and has appealed from their award, does not prevent his maintaining an appeal from a portion of such order which was in excess of the court's jurisdiction over the subject matter.

APPEAL from an order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Modified and affirmed.*

The plaintiff, having obtained the necessary preliminary authorization from the Railroad Commission for the construction of a road passing through the city of Burlington, filed its petition, alleging the survey and staking out of its road, the necessity of running its line upon certain streets and highways in said city, entitling persons named in the petition to damages for the injury; also the necessity for taking certain sundry parcels of land, including a triangular piece of a certain lot 8 in block 10, lying in the southeast corner of said lot, and extending seventeen feet on the east line and thirty-two feet on the south line, according to a map attached. The petition also alleged that the city of Burlington had granted a franchise to use certain streets, which franchise was not quoted in, or by copy annexed to, the petition, but that document referred to the franchise in the following words: "To which reference is hereby made, to the same effect as though a certified copy were hereto annexed and made part hereof." There is contained in the record a certified copy of a franchise which both parties treat as the one referred to in the petition.

It appears that the appellant owns lots 6, 7, and 8 in block 10, which lie at the northwest intersection of Fox street running east and west and Second street running north and south. The franchise authorized respondent to enter Fox street east of Second street and to run along Fox street past the appellant's said premises, crossing Second street within

the limits of Fox street. The surveyed line, according to the map attached to the petition, ran diagonally across private property to the east line of Second street, entering that street about twenty feet north of Fox street and running diagonally across it to the southeast corner of appellant's land in



block 10, thence diagonally southwestward along Fox street. The petition contained prayer for condemnation of the rights of appellant within the streets traversed by the surveyed line, also of the said triangular parcel in lot 8. The application was opposed by the respondent, and after trial was granted and the usual order made on April 3, 1909, declaring the necessity of said lands for plaintiff's purposes and appointing commissioners, from which order defendant took an appeal May 8, 1909. Those commissioners made an award to

the defendant, from which it appealed May 8, 1909. The disposition of the appeal in the circuit court is not disclosed by the record.

For the appellant there was a brief signed by *George W. Waller,* attorney, and *John B. Simmons,* of counsel, and oral argument by *Mr. Waller.*

For the respondent there was a brief by *Louis H. Rohr,* attorney, and *Clarke M. Rosecrantz,* of counsel, and oral argument by *Mr. Rosecrantz.*

DODGE, J. The appeal from this order can raise no question except the sufficiency of the petition to support it. There is no bill of exceptions, and therefore a necessary presumption arises that all facts which might have been proved under the petition have been so proved as to support the order. Some doubt is entertained whether we ought to consider the copy of the franchise in the record, instead of presuming that under this petition was introduced in evidence a franchise justifying the order entered. We have concluded, however, by reason of the peculiar phrasing of the petition quoted in the statement of facts substantially consenting that a franchise existing on the public records of the city might be referred to with the same effect as if set forth by copy, that we may ignore the informality of the pleading and consider the case on appeal as if the franchise which we find in the record had been so attached. No defects in the petition are suggested to defeat jurisdiction of the court, except that it does not show a franchise from the city council of Burlington to use any part of Second street north of Fox street nor to run along Fox street upon the surveyed line. By virtue of sec. 1863*a,* Stats. (Supp. 1906), street or electric railway corporations are given all the rights of condemnation of private property conferred upon commercial railway corporations by the statutes (sec. 1846, Stats. 1898), with some modifications not here material. This petition contains, as we

have said, all the elements essential under sec. 1846 to give the court jurisdiction to appoint commissioners for such condemnation of all private property required. *Winnebago F. Mfg. Co. v. Wis. M. R. Co.* 81 Wis. 389, 51 N. W. 576; *In re Milwaukee Southern R. Co.* 124 Wis. 490, 102 N. W. 401. Whether or not the private property of the appellant authorized to be condemned by the order is required for the purposes of the railroad is a question of fact (sec. 1847, Stats. 1898; *Chicago, M. & St. P. R. Co. v. Richardson,* 86 Wis. 154, 56 N. W. 741; *Chicago, St. P., M. & O. R. Co. v. Bayfield Co.* 87 Wis. 188, 194, 58 N. W. 245), which it must be presumed the court has resolved upon sufficient evidence. The argument of the appellant is that the franchise did not prescribe such a course for the railroad as that its land taken could be necessary. This is by no means clear, for even if the railroad ran according to the course indicated by the franchise, conditions are conceivable such as to make this triangular piece of land necessary to safe and easy construction and operation of the railroad, and it is all within the 100 feet of right of way authorized by sec. 1863*a*, Stats. (Supp. 1906), even upon the most limited construction of the franchise, namely, that of a single track in the center of Fox street. However, the franchise is not so limited. It only requires that the track approximate the center as near as practicable, and with exception in favor of switches, turnouts, or side tracks, which may be controlled by certain city officials. If any construction of the road could be approved such as to render this triangular piece of appellant's lot reasonably necessary, presumably such approval was proved to the satisfaction of the trial court. No failure of the petition to show the ability of the company to reach this particular point in its road is fatal to the petition. *In re Milwaukee Southern R. Co.* 124 Wis. 490, 498, 102 N. W. 401. For these reasons we cannot hold that any error was committed in ordering condemnation of the portion of appellant's premises outside the streets.

When we approach that portion of the order which authorizes the condemnation of the appellant's rights in that part of Second street north of Fox street we are confronted, however, with a different situation. The power of the railway to condemn such rights within a street or other public place is by sec. 1863*a* conditioned upon the existence of a franchise granting the use of such street. This is a condition precedent, and goes to the very jurisdiction both of the corporation to seek condemnation of streets and of the court to grant it. *Beloit, D. L. & J. R. Co. v. Macloon,* 136 Wis. 218, 116 N. W. 897. We cannot, even by the most liberal construction of a franchise authorizing the mere crossing of Second street within the limits of Fox street, deem it a permission to occupy some other part of Second street not within the crossing. We are convinced that the respondent failed to show the existence of this condition precedent, and that the portion of the order relating to Second street north of Fox street in front of the appellant's premises is not only erroneous, but beyond any jurisdiction aroused in the circuit court by this petition.

Respondent's contention that the appellant cannot maintain an appeal from this order after he has joined in the litigation before the commissioners under it and has appealed from their award in an effort to increase it cannot be sustained with reference to that portion of the order which is held to be in excess of the court's jurisdiction over the subject matter. *Winnebago F. Mfg. Co. v. Wis. M. R. Co.* 81 Wis. 389, 51 N. W. 576.

By the Court.—The order appealed from is modified by striking out all portions thereof relating to that part of Second street in the city of Burlington lying north of the north line of Fox street, and as so modified is affirmed. Appellant to recover costs in this court.

PHELPS and others, Appellants, vs. AYERS, Respondent.

March 16—April 5, 1910.

Landlord and tenant: Fixtures: Right of removal.

1. If a lessee surrenders possession of the premises before removal of a fixture, without an express reservation of the right of removal, he loses all right to remove it.
2. The law implies in such a case that the lease and the use and occupation of the premises thereunder constitute a consideration compensating the lessee for the cost of adding the fixture to the land, and can afford no relief if the lessee sustains pecuniary loss by his omission to remove it.
3. An icehouse, built on leased premises by the lessee in such a way as to make it a substantial and completed structure adapted to the use of the realty, became a fixture and the lumber used therein ceased to be personalty, notwithstanding circumstances from which it might be inferred that the enterprise was of a temporary nature and was to continue only for the one season covered by the lease.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

On February 21, 1906, the defendant leased to one John McGovern certain premises in the town of Burlington, Racine county, for the period ending December 1, 1906. Within the lease was included the right to cut ice upon a millpond on the premises. The defendant reserved the right to cultivate such part of the premises as was not used by the lessee. The lease contains nothing on the subject of fixtures. The plaintiffs allege that they entered into a verbal agreement with the lessee, whereby they were to furnish lumber for a temporary structure to protect the ice which was to be harvested from the millpond, and that it was understood and agreed that the structure so to be erected was temporary in its nature. It is also claimed that the plaintiffs made an agreement between themselves for the disposition of the lumber after the ice should be removed from the icehouse, and that

by this agreement one of the plaintiffs was to purchase the interests of the others in the lumber. The plaintiffs supplied the labor and the lumber from which an icehouse was constructed upon the premises to protect the ice crop which was gathered from the pond. During the summer the ice was removed from the icehouse along a spur track which was laid to the icehouse. When the crop had all been removed this spur track was taken up. There is evidence that the ice had been all removed from the icehouse by July 1st, and that the plaintiffs had about five months within which to remove the lumber before the expiration of the lease, but no steps were taken to assert title to the lumber or to remove it until about December 20, 1906. On December 4th the defendant, as owner of the premises, nailed up some loose boards on the icehouse and placed a padlock upon the door to exclude tramps from the building. The plaintiffs claim that the building is not a fixture, but merely a chattel which they had the right to remove, and that they are entitled to damages because the defendant has refused to permit them to remove the lumber and has appropriated it to his own use. They claim that the temporary character of the building, the use to which it was devoted, the accompanying facts and circumstances of the situation showing the relation of the parties, and the nature of the transactions and the implied understanding of the parties, all indicate that the structure is a chattel.

The defendant claims that the structure is a substantial one, adapted to the use of the premises, and from its nature and purpose it became an accession to the real estate; that when the lease was signed it was understood that if the lessee wished to remove it he was to do so before the expiration of the lease; and that this understanding was evidenced by the scrivener's question to the lessee if he understood that the building must be removed during the life of the lease and by the lessee's assent thereto.

The court found that the building was a substantial structure, and held it to be a fixture and that title thereto vested in the lessor upon the expiration of the lease. Judgment was ordered dismissing the complaint. This is an appeal from the judgment.

For the appellants there was a brief by *Ryan, Merton & Newbury,* and oral argument by *T. E. Ryan.*

For the respondent there was a brief by *Fish & Storms,* attorneys, and *Irving A. Fish,* of counsel, and oral argument by *Irving A. Fish.*

SIEBECKER, J. The court's findings of facts, supplemented by the undisputed evidence, show that the plaintiffs and the lessee of the defendant occupied the defendant's premises under a lease to conduct the business of storing and selling ice which was harvested from the millpond on the premises during the term of the lease, and for this purpose constructed the icehouse in question. It appears that the plaintiffs and the lessee, McGovern, arranged to engage in this enterprise before the execution of the lease; that the plaintiffs, pursuant thereto, undertook to furnish the lumber needed for erecting the icehouse and to defray the cost of its construction; and that it was understood between them that the title to the lumber was to remain in these plaintiffs. The facts and the accompanying circumstances of the transactions between the lessee, McGovern, and the defendant, as owner of the premises, warrant the implication that it was understood at the time of the making of the lease that these parties intended that the icehouse and the lumber therein might be removed from the premises by the lessee and the plaintiffs. No time was, however, specified in the agreement of the parties within which such removal was to be made. Under these circumstances the law limits the time for the exercise of this right to the period covered by the lease or the period after its expiration during which the lessee remains

in possession of the premises, if the structure is of a nature which makes it an accession to the real estate and thus a fixture. See the following cases: *Keogh v. Daniell,* 12 Wis. 163; *Fitzgerald v. Anderson,* 81 Wis. 341, 51 N. W. 554. There is no uncertainty in the law that if a lessee surrenders possession of the premises before removal of a fixture, without an express reservation of the right of removal, he loses all right to remove it. *Josslyn v. McCabe,* 46 Wis. 591, 1 N. W. 174; *Hart v. Hart,* 117 Wis. 639, 94 N. W. 890; *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501, 34 N. W. 514.

The appellants aver, however, that their right and title to the lumber in the icehouse is founded on the fact that the structure and the material composing it never became an accession to the real estate on which it was erected and that it is now personal property, and hence that the title thereto did not pass to the defendant, as owner of the real estate, at the expiration of the McGovern lease. This claim raises the inquiry whether or not the lumber in the icehouse has changed its status from that of personalty to realty. This status is determined by the accompanying facts. The evidence does not show that the parties to the lease mutually intended that this material should remain personalty. Hence we have a mental attitude of one party opposed to that of the other respecting this question, and we must therefore resort to the external and visible facts and accompanying circumstances to determine the controversy. This involves the inquiry as to whether or not the structure was actually annexed and appurtenant to the land, the inquiry as to whether or not it was appropriate to the use of the realty on which it was placed, and an inquiry into the structure of the building, its mode of annexation, and the relation and situation of the parties to the transaction. The evidence shows that the building was located and attached to the ground as icehouses usually are built, which is by resting the superstructure on

wooden sills or planks, by erecting thereon the framework, and inclosing it with boards on the sides and a shingled roof. All of the parts were properly united to make a substantial and completed structure for storing ice. As thus constructed it was appropriate for storing ice on the premises on which it was located, which appear to have been conveniently located as to proximity and accessibility to the millpond from which the ice was harvested. All of these are persuasive facts to show that the icehouse was in its nature and purpose adapted to the use of the real estate to which it was attached, and in their probative force clearly rebut any contrary inferences arising from the situation and relation of the parties. While it may be inferred from the situation that this enterprise was of a temporary nature and was to continue only for the one season covered by the written lease, this is not necessarily incompatible with the idea that this structure has characteristics of permanency, and, under the accompanying circumstances, became an accession to the realty. We are persuaded that the structure is a permanent accession to the realty and that the lumber composing it did not retain its former status of personalty.

It is urged that this conclusion operates to transfer to the defendant a large amount of property without any consideration. Such is not the legal implication of the case. Since the plaintiffs did not remove the structure while in possession of the premises under the lease, and did not by agreement with the defendant reserve a right to remove it thereafter, the law implies that in consideration of securing the lease of the premises and its use and occupation they were compensated for the expense of its erection, and that these considerations operated to compensate them for the cost of adding this fixture to the defendant's land. From any viewpoint of the conduct of the parties, the consequences of the situation which vests the right to this structure in the defendant are attributable to the voluntary acts of the plaintiffs in

omitting to seasonably remove the building during the lessee's tenancy and in their failure to reserve the right to remove it thereafter. Under these circumstances the law is unable to afford them relief if they sustained pecuniary losses through such omissions.

By the Court.—Judgment affirmed.

WILL OF HARRINGTON.

March 17—April 5, 1910.

Wills: Construction: Perpetuities: Two lives in being: Trusts: Time fixed for distribution: Survivorship: "Remaining living heirs:" Indefinite failure of issue.

1. Where a disposition of real property by will is questioned for remoteness of time of vesting, the inquiry involves, not the number of estates which precedes the time of vesting, but the number of designated persons living at the time of the death of the testator who must die before it can be known in whom the title to the property will vest.
2. The power of alienation is suspended beyond the period permitted by statute by the creation of future estates when the period within which such estates can vest is so remote that the persons in whom they are to vest cannot be ascertained until after the lapse of more than two lives in being at the death of the testator and twenty-one years in addition.
3. The power of alienation may also be suspended by a devise in trust where the trust term exceeds two lives in being and twenty-one years and alienation prior to that time would be in contravention of the trust and void under sec. 2091, Stats. (1898).
4. To construe a will not expressly bequeathing personal property in trust as creating a trust with the designated executors as trustees, is proper when this is necessary to carry out the apparent intention of the testator, but not otherwise.
5. Provisions in a will specifying a fixed time certain to arrive for the distribution of testator's personal property among his surviving children and the children of any deceased child must, as

the larger and more significant indication of intention, override mere words and forms of expression not inconsistent therewith but somewhat indicative of a contrary intention.

6. Where, after devise of a life estate to two persons, a life estate in remainder is devised to each of testator's four children, and this is followed by a provision that in case of the death of either one of the four children the property willed to either of them is to be equally divided to the remaining living heirs of the testator, subject to the same rule of descent and governed by the same rule as is the property willed directly to the testator's children, there is an apparent intention of the testator that after the death, subsequent to his own, of either of his children without issue the share of such child and the same estate which was provided for such child should pass to the surviving children of testator and to the issue, then living, of any other deceased child.

7. Such a provision shows also an intention that the property so passing to the survivors shall be affected by the same quality of survivorship, so that in case of other deaths of testator's children without issue the whole property would accumulate in the last survivor, except as it had been diminished by vesting in part in the issue of children who died leaving issue.

8. Alternative legacies and bequests conditioned upon the "death of all my children and any and all children or heirs being their descendants," "the death of all my children and their heirs, meaning any grandchildren that may be born hereafter," and "the death of all my children and their children or heirs," following a fixed time, certain to arrive, for distribution of personal property among testator's children and the child or children of any deceased child of testator, relate to such failure of issue at the time fixed for distribution, and not to an indefinite failure of issue.

APPEAL from a judgment of the circuit court for Walworth county: E. B. BELDEN, Circuit Judge. *Affirmed.*

For the appellants *M. S. Harrington* and others there was a brief by *W. D. Corrigan, F. H. Gugel,* and *H. H. Harrington,* and oral argument by *Mr. Gugel.*

For the appellant *Nashotah House* there was a brief by *Ryan, Ogden & Bottum,* and oral argument by *L. M. Ogden.*

For the respondents there was a brief by *Simmons & Walker, D. B. Barnes,* and *E. L. von Suessmilch,* and oral

argument by *Mr. John B. Simmons, Mr. Suessmilch,* and *Mr. Barnes.*

TIMLIN, J. This is a suit for the construction of the will of Nicholas M. Harrington, who died May 30, 1888, and whose will was admitted to probate in the county court of Walworth county on July 17, 1888. The testator left surviving him his widow, Catherine M. Harrington, and Frank C., *John R.,* and *George N. Harrington,* and *Jennie E. Bowers, née Harrington,* his children and only heirs at law. *Jennie E. Bowers* married after the execution of the will and before the death of the testator, but she had no children living at the date of testator's death. Two were afterward born to her, each of which lived but a few days. She is still living. Frank C. Harrington died unmarried and without issue on September 22, 1905. *John R.* and *George N. Harrington* are still living, unmarried, and without children. Catherine M. Harrington, testator's widow, died September 8, 1900.

This suit was begun May 21, 1907. In the will *Jennie E. Bowers* is called *"Jane"* and sometimes *"Jennie."* The will was evidently written by the testator, and from among its rambling, confused, and incoherent provisions the following are selected as indicating the general plan of the testator in the disposition of his property:

(1) Give and bequeath to my widow Catherine M. Harrington, sister *Julia A. Crosby,* daughter *Jane E. Harrington* the use of the whole of my estate, real and personal, during their natural lives, unless either one should marry, then to be provided as hereinafter mentioned.

(2) After the death of Catherine M. Harrington and *Julia A. Crosby* I give and bequeath the use of the Inlet Farm to Frank C. Harrington during his natural life, and after his death to descend to his heirs. Also I give and bequeath all the personal property belonging to or connected with said farm to Frank C. Harrington after the death of Catherine M. Harrington and *Julia A. Crosby.*

(3) I give and bequeath the use of the Prospect Farm, during their natural lives, to my sons *John R. Harrington* and *George N. Harrington* after the death of Catherine M. Harrington and *Julia A. Crosby,* to descend to the heirs of said sons after their death. All personal property on the farm after the death of Catherine M. Harrington and *Julia A. Crosby* to become the property of *John R.* and *George N. Harrington.* After the death of my said sons *John R.* and *George N. Harrington* said land is to descend to their heirs.

(4) I give and bequeath to my daughter *Jennie,* should she marry, the use of two dwelling houses (described); also give and bequeath to her after the death of Catherine M. Harrington and *Julia A. Crosby* the use of a piece of land (described); also give and bequeath to her after the death of Catherine M. Harrington and *Julia A. Crosby* the use of another piece of land (described). All of said property being real estate willed to my daughter is given to her during her natural life and at her death is to descend to her heirs.

(5) In case of the death of either one of my children, the property, real or personal, willed to either of them is to be equally divided to the remaining living heir of mine, subject to the same law of descent and be governed by the same rule as is the property willed directly to them in this will.

(6) I give and bequeath the use of all the remaining real estate to Catherine M. Harrington and *Julia A. Crosby* and my daughter during their natural lives, and afterward the use to be equally divided between my heirs during their natural life.

(7) Executors are to have the right and power to convey by good and lawful title certain described land not included in the foregoing devises. Also they may sell and convey, if all parties interested are united, two of the tracts devised to *Jennie* subject to the prior use of Catherine M. Harrington and *Julia A. Crosby.*

(8) A small piece of real estate is given to his brother Milton S. Harrington during his natural life; at his death this to descend "to my nearest heirs."

(9) "Now, as to my personal property, I give and bequeath the use of it (except such as may hereinafter be excepted) to my beloved wife Catherine M. Harrington, *Julia A. Crosby,* and my daughter *Jennie A. Harrington,* during their natural lives."

(10) "Should my daughter marry, my executors are to pay her the sum of $500 in money and charge the same to her part, as a part of her share of the personal property.

(11) "I also give and bequeath to my daughter *Jane E. Harrington* the dividends on five shares of the capital stock of the First National Bank of Racine, and I hereby appoint and name the cashier of said bank and his successors as trustees and guardian of said bank stock to take care of said stock for the use and benefit of my daughter *Jane;* but in no event is she, my daughter, or said trustee, authorized to sell said stock; and in case of the death of my daughter *Jane* without issue, said trustee is authorized to pay the dividends to my remaining heirs, but said stock is in no way to be disposed of; but is to remain in said bank during the existence of said bank, to be kept by said cashier for the use and benefit of my heirs."

(12) I give and bequeath the dividends of five shares of the capital stock of the First National Bank of Elkhorn to my beloved sister *Julia A. Crosby,* during her life, and appoint the cashier of said bank and his successors trustees for the care and management of said stock, and pay the dividends to said *Julia A. Crosby,* but neither said trustee or said *Julia A. Crosby* is to have the power to sell the stock. This bequest is made in the place of a note said *Julia A. Crosby* holds against me, and pay one year after my death, which note is hereby revoked and canceled.

(13) All the rest of my personal property is to remain just as it now is, subject to and under the control and management of my beloved wife Catherine M. Harrington, *Julia A. Crosby, Jane E. Harrington,* Frank C. Harrington, *John R. Harrington,* and *George N. Harrington,* whom I appoint and name as my executors; and to have the entire control of my property, real and personal, and to carry out the intent and spirit of this will, and all sales, and all business is to have the concurrence and unanimous consent of all said executors. No bonds to be required or given by said executors.

(14) The household property, books, carriages, are subject to the use of my wife Catherine M. Harrington and *Julia A. Crosby,* and *Jane E. Harrington,* Frank C. Harrington, *John R. Harrington,* and *George N. Harrington,* and any change or sale is to be subject to the consent of the

above named executors, and at the death of my wife Catherine M. Harrington and *Julia A. Crosby,* and in three years thereafter, an equal division is to be made, share and share alike, between my children or such of them as may be living; except the personal property reserved to the parties or persons to whom it is willed, remaining on the farms at the time of the death of said Catherine M. Harrington and *Julia A. Crosby* as heretofore provided in this will.

(15) All the money, stocks, or other personal property is to be equally divided between my children except the $500 provided for my daughter in case she should marry, which in that case is to be deducted from the amount of money found due her on an equal division of my personal property to be made within three years after the death of my wife and *Julia A. Crosby,* except the personal property mentioned as being on said farms, which said amount on said farms is not to be invoiced, and is to go and belong to my respective sons to whom said land is willed.

(16) In order that there may be no misunderstanding in regard to my meaning, I intend my wife and *Julia A. Crosby* shall have their living and support out of my property during their natural lives unless they should marry, and in that event they are to each have their support during their natural lives, but no part of said property is to go to the support of their husbands, and the control of my property shall pass into the hands of and be under the control of my children Frank C., *John R., Jane E.,* and *George N. Harrington,* and they are to give a reasonable support to Catherine M. Harrington and *Julia A. Crosby* during their natural lives.

(17) In case my daughter shall marry, my executors heretofore named are to pay her the sum of $500, but no more until three years after the death of my beloved wife and *Julia A. Crosby.* After the death of the last named, then my daughter *Jane E. Harrington* is to have the use of the real estate provided for her in this will, during her natural life, and then to descend to her heirs.

(18) As I have $2,000 life insurance due me at my death my executors are directed to take up or buy a certain mortgage against my brother Milton S. Harrington's house and lot where he now lives and hold said mortgage or take a new one at three per cent. interest annually during my said

brother's natural life, allowing my said brother to pay said mortgage at his pleasure.

(19) All surplus money made from my estate by my said executors and any and all money due or to become due my estate is to be put at interest after the support of the parties hereinbefore provided.

(20) I hereby nominate and appoint James F. Lattimer and Inglis as trustees to take charge of any and all money heretofore loaned by them or they may hereafter receive, which is to include all my personal estate in notes, mortgages, and the money, if any, that may remain in the hands of H. B. Claflin & Co. of New York, also my life insurance money, and said Lattimer and Inglis are to account to my executors for said money that they may receive at the rate of seven per cent. per annum, and reinvest the same and account once or twice in each year for all the money they may have in or under their control. Any moneys otherwise provided for or disposed of is not to be subject to said Lattimer and Inglis, and after and at the end of ten years said money (and its accumulation) is to be equally divided share and share alike, but in no instance shall either or any of my heirs have the power to sell or in any way dispose of said sum of money and its accumulation until said ten years have expired.

(21) The $500 now forming a part of the investment of E. Lattimer & Co., of which I am a partner, is to remain in said banking firm, and my property of any and all kinds is to remain as liable for all the liabilities of said banking firm the same as though I was living, and all dividends shall be paid to my wife, this provision to remain and be in full force until the dissolution of said banking firm, either by death or dissolution, and if said banking firm shall cease by either the above causes before the expiration of ten years, then the said banking firm shall pay all the money due my estate to the said Lattimer and Inglis to form a part of the money subject to their control, and at the end of ten years to be equally divided with my living heirs.

(22) The intention being to have my wife Catherine M. Harrington, my beloved wife's sister *Julia A. Crosby* the entire use and direction of my real and personal property during the natural lives, and then if the ten years have expired

of the agency of said Lattimer and Inglis my personal property is to be divided equally amongst my four children, share and share alike, but the division of my personal property is not in any event to be made until the death of my beloved wife Catherine M. Harrington and *Julia A. Crosby.* Should each of the last named die before the ten years, said personal property is to remain in the hands of said Lattimer and Inglis, . . . it being the intention of said testator that said personal property is to be equally divided between my children living at the time they may be entitled to said property.

(23) In the event of the death of all my children and any and all children or heirs being their descendants, $5,000 is hereby donated to Nashotah Theological Seminary (*Nashotah House*). I give and bequeath to Christ's Church in Delavan, Wisconsin, the sum of $500 to be laid out in purchasing a church bell to be put in the tower of said, neither of these donations are binding or to be paid unless in case of the death of all my said children and their heirs meaning in children or grandchildren that may be born thereafter.

(24) The rest of my property, real and personal, in the event of the death of all my children and their children or heirs, is to be share and share alike divided between my half-brothers and half-sisters.

The circuit court held that Catherine M. Harrington and *Julia A. Crosby* took a life estate or interest in all the real and personal property except that real estate devised to *Jennie* in the preceding paragraph 4, the bank stock described in paragraph 11, the bank stock described in paragraph 12, the household property, etc., described in paragraph 14, the $500 described in paragraph 21, the real estate devised by paragraph 8, and that this life estate and interest was valid and subject to the management of the executors named in paragraph 13.

As to the real estate in paragraph 4 and the $500 mentioned in paragraph 17, the court held that the latter should be paid over to *Jennie* and deducted from her share of the personal property on the distribution hereinafter mentioned; that *Jennie* took a life estate in the real estate mentioned in

paragraph 4, lots 18, 19, and 22, in block 12, in the village of Delavan, with remainder in fee to her surviving children, if any. What will become of this real property in case of the death of *Jennie* leaving no surviving children is not found. This disposition of these lots is not excepted to by either appellant.

With respect to the bank stock described in paragraph 11, this should be held in trust by the cashier of the bank, the income thereof to be paid over annually by this trustee to *Jennie* during her natural life, on her death leaving issue to such issue or their heirs or legal representatives during the corporate existence of the bank, upon the dissolution of the bank the principal to be paid over in equal shares to said issue, their heirs or legal representatives, but, in the event of *Jennie* dying leaving no issue surviving her, then the income from the five shares of bank stock should be paid over in equal shares to the surviving children of the testator, the issue of any deceased child taking the share which would otherwise have gone to such deceased, and, upon the dissolution of the bank and after the expiration of three years from the death of *Julia A. Crosby,* the principal of said five shares to be paid in equal shares to the then living children, if any, of the testator and the issue of any such deceased child, and, in case of the death of all the children of said testator during the corporate existence of the bank leaving no issue surviving, then the principal of said five shares to be paid to the said *Nashotah House* and to Christ's Church in the city of Delavan in the proportion of ten elevenths to the former and one eleventh to the latter. With respect to the other five shares of bank stock mentioned in paragraph 12, the court held that this property was to be held in trust by the cashier of that bank, the income paid over annually by this trustee to *Julia A. Crosby* during her natural life, and at her death said bank stock would fall into the residue of the personal estate, to be divided and distributed as hereinafter mentioned.

With respect to the household property, etc., mentioned in

paragraph 14, the court held this bequeathed to Catherine M. Harrington, testator's widow, and *Julia A. Crosby* and the four children of the testator for their use in common during their respective lives, and after the death of all of them, should any of that property remain, the same is to be distributed as a part of the residue of the estate. This is not excepted to by either appellant.

With respect to the $500 mentioned in paragraph 21, that is to remain part of the capital of the banking firm mentioned, and the income paid over annually to Catherine M. Harrington, widow of the deceased, during her natural life. In case of the dissolution of the banking firm before the expiration of ten years from the death of the testator, this principal to be paid over to Messrs. Lattimer and Inglis of Hampton, Iowa, to be invested by them along with other funds of the testator in their hands, and finally divided and distributed in the same manner as other moneys in their hands, and as hereinafter mentioned.

With respect to the estate in paragraph 8 devised by the testator to his brother Milton S. Harrington for life, the remainder in fee vested at once on the death of the testator in his children, subject to said life estate.

With respect to the real estate mentioned in paragraphs 2 and 3 and part of that in paragraph 4, and all that in paragraph 6, the court held that the attempted disposition of that property after the lives in being of Catherine M. Harrington and *Julia A. Crosby* and testator's children was void for remoteness, and that the persons ultimately entitled thereto under this will could not be ascertained until after the expiration of more lives than two in being at the time of the creation of the estate. It therefore passed to the heirs at law of testator as intestate property, but subject to the life interest of Catherine M. Harrington and *Julia A. Crosby.*

The court considered that the will of the testator as to all personal property was valid, and contravened no rule against

remoteness; consequently that the disposition of the property on each of the two farms mentioned in paragraphs 2 and 3 was valid, and that after the death of Catherine M. Harrington and *Julia A. Crosby* the personal property on the farm mentioned in paragraph 2, known as the Inlet Farm, because Frank C. Harrington died intestate prior to the death of *Julia A. Crosby,* will go to the surviving children of the testator, Nicholas M. Harrington, in equal shares under paragraph 5. The personal property on the Prospect Farm mentioned in paragraph 3 is upon the death of *Julia A. Crosby* to become the property of *John R. Harrington* and *George N. Harrington,* sons of the testator, equally and in common, provided they are then living. What becomes of this in case both of the last-named sons of testator have deceased prior to the death of *Julia A. Crosby* and leaving no issue is not found or adjudged.

The circuit court further decreed that after the death of *Julia A. Crosby* (more than ten years having elapsed since the death of testator) the interest in the capital of the banking firm of E. Lattimer & Co., if that firm has not dissolved, and the avails of that interest if the banking firm has dissolved, and all the money and property of testator in the custody of Lattimer and Inglis, and all surplus or increase realized by the executors, are to be distributed equally among the then living children of testator and the issue then living of any such deceased child; that three years after the death of *Julia A. Crosby* all the residue of the property left by testator and all real estate of which the executors had a power of sale is to be by the executors divided equally between the children of testator then living and the issue of any such child deceased, such issue taking the parent's share, but deducting from the share of the daughter *Jennie* the $500 advanced to her upon her marriage, if in fact such advance was made.

Catherine M. Harrington has deceased, and in one of the

briefs of counsel we find it stated that the banking firm of E. Lattimer & Co. has dissolved; but we cannot take judicial cognizance of that fact. The judgment of the court below, while it works out a scheme of division and distribution under this will with praiseworthy diligence and ingenuity, is yet faulty, in that it does not finally dispose of all questions of construction possible to be disposed of, and does not sufficiently regard existing facts and conditions, such as the dissolution of the firm of Lattimer & Co., which is not found either way, the sale of some of this property in the testator's lifetime, and extrinsic facts of this nature generally. But the parties affected by these defects in the judgment do not appeal, and the investigation of such questions is not involved in the appeal of the *Nashotah House* and the half-brothers and half-sisters, who are the only appellants. We shall therefore consider only the questions raised by these appellants.

The half-brothers and half-sisters of testator contend with respect to the real property that the circuit court should have construed the life estate or interest given by the will to Catherine M. Harrington and *Julia A. Crosby* as an estate for only one life, namely, the life of the survivor of these two, and that each of the four children of testator then took another life estate which terminated with his life. If he dies leaving issue, then a one-quarter interest in the real estate vests in this issue. If he dies leaving no issue, a quarter interest in the real estate vests in the half brothers and sisters subject to the legacies to *Nashotah House* and Christ's Church. But this seems to us to contravene both the law and the intention of the testator. All inquiry concerning whether Catherine M. Harrington and *Julia A. Crosby* took as joint tenants or tenants in common seems to us irrelevant and immaterial.

In the first place, a devise of real estate during the life of the longest liver of two designated persons in being is, and

has always been, considered a devise for two lives in being, just as a devise of real estate during the life of the longest liver of ten designated persons in being is for ten lives in being, and this is what was referred to by the expression, "all the candles must be alight at once." It is not the number of life estates created which we are to consider, but the number of lives in being which must expire before it can be ascertained in whom the title to the property shall vest. *Jennings v. Jennings,* 7 N. Y. 547; *Purdy v. Hayt,* 92 N. Y. 446. The lives in being designated by the testator may be the lives of the devisees or of beneficiaries under a trust, and the carrying out of the will may require the restraint of alienation during these lives, because during that time the remaindermen are contingent and unascertainable, and therefore the power of alienation is suspended, or because the trust created by the will may continue over the number of lives allowed and during that time alienation be impossible, under sec. 2091, Stats. (1898), in all cases where such alienation would be in contravention of the trust. Or persons in being at the creation of the estate who do not take under the will at all may be designated and the number of persons so designated constitutes the number of lives in being, although the suspension of alienation can only continue during the life of the longest liver of the persons so designated.

In the instant case, even on the above-mentioned theory of counsel for the half brothers and sisters, three lives in being must expire before it could be ascertained who would ultimately take the property, or whether the title would ultimately vest in some unborn grandchild of the testator, and hence there would be a suspension of the power of alienation during these three lives. But it is, we think, contrary to the intention of the testator as evidenced by this will to hold that, after the decease of Catherine M. Harrington and *Julia A. Crosby,* each of the testator's children took only a life

estate in one fourth of testator's real property which terminated with his death, and then vested in the half brothers and sisters in default of issue.

Paragraph 5 provides that in case of the death of either one of the four children the property, real or personal, willed to either of them be equally divided to the remaining living heirs of the testator, subject to the same rule of descent and be governed by the same rule as is the property willed directly to the testator's children. This relates to the death of either one of testator's children after the death of the testator. *Korn v. Friz,* 128 Wis. 428, 107 N. W. 659; *Chesterfield v. Hoskin,* 133 Wis. 368, 113 N. W. 647. This for the reason that the estate devised to testator's children is a life estate, and because from the whole purview of the will, including the legacy to *Nashotah House* and the devise to the half brothers and sisters, it is apparent that the testator intended that neither this legacy nor the devise to the half brothers and sisters should take effect in whole or in part so long as there was a child or grandchild of the testator living. This fifth paragraph must also be construed with reference to the disposition in the will made of the two farms called the Inlet Farm and the Prospect Farm, and the disposition made of the real property to *Jennie.* "The remaining living heirs" of testator would be his surviving children and the children of any such child deceased. But the property is to be equally divided to the remaining living heirs. This, to harmonize with other provisions of the will relating to the devise of real estate, must be taken to mean the death of either one of the testator's children without issue, and these two words may be supplied. A provision in the will like that in paragraphs 2, 3, and 4, expressly providing that at the termination of a life estate in real property the property should descend to the heirs of the life tenant, would be contradicted by this paragraph 5 if we should hold that in case of the death of one of the same life tenants leaving children this property should not vest in these children, but should be equally di-

vided between such children and all the other living heirs of the testator. They must be harmonized, if possible, and the way to harmonize these provisions is to construe the fifth paragraph as applying to the case of the death occurring after testator's death of either one of testator's children without issue. In that case the property, real or personal, willed to either of testator's children is to be divided equally to the remaining living heirs of testator, which includes children of testator and certain grandchildren of testator under our statute. But this estate so passing from the child who dies without issue to the remaining living heirs of the testator is to be subject to the same law of descent and governed by the same rule as is the property willed directly to the children of testator. This must mean that the property so passing over to the survivors was intended to be affected by the same quality of survivorship, and so, in case of other deaths of testator's children without issue, the whole property would accumulate in the last survivor, except as it had been diminished by vesting in part in the issue of children who died leaving issue. In such case, at the time of the death of that child of the testator who died first without issue three lives in being at the creation of the estate would have expired, and the real property would pass to the surviving brothers and sisters, children of the testator, until the death of another of the children without issue, when the share he received through the death of his brother or sister without issue, together with his own share, would pass to the two surviving children of the testator, and so on. On the other hand, in case of the death of any one of the children of the testator leaving issue surviving him, it could not be known until the expiration of three lives in being at the time of the creation of the estate whether such issue or the other brothers and sisters would take. All this leads to the conclusion that the circuit court properly construed the will with reference to the real property.

In the appeal by *Nashotah House,* called in the will Na-

shotah Theological Seminary, only the disposition by the court of the personal property and of the real estate in respect to which the power of sale is given is criticised. The learned counsel for that appellant makes no attack upon the ruling of the court below regarding the invalidity for remoteness of the devise of the other real estate. But he contends that the will should have been construed as vesting the title to the personal property and real estate which is subject to a power of sale (excepting that personal property which is otherwise specifically bequeathed) in the executors named in the will in trust to pay the income thereof to Catherine M. Harrington and *Julia A. Crosby* during their natural lives, and upon the death of the survivor to pay the net income thereof to the then surviving children of said testator during their natural lives, and upon their death to the descendants of testator, and, in case no such descendants should survive them, to pay to the appellant *Nashotah House* the sum of $5,000 and to Christ's Church in Delavan, Wisconsin, the sum of $500, and divide the residue, share and share alike, between the half-brothers and half-sisters of the testator or their heirs. The effect of this construction of the will would be to establish a trust with respect to the personal property with the executors as trustees, which would continue during the lives of Catherine M. Harrington and *Julia A. Crosby* and the lives of the four children of the testator, the title to the corpus of the trust estate then to vest in the grandchildren of testator if any such were living at the death of the last surviving child of the testator; if none was living, then to vest in the half brothers and sisters of the testator and the legacies to *Nashotah House* and Christ's Church to become due and payable. This no doubt is proper and permissible in all cases where the establishment of such trust with the executors as trustees is necessary to carry out the intention of the testator. *Swarthout v. Swarthout,* 111 Wis. 102, 86 N. W. 558.

The substantial difference between this disposition of the

estate of the testator under the will and that disposition made by the circuit court is that the disposition proposed by the counsel for *Nashotah House* rejects the view of the circuit court that the testator intended that this personal property, not otherwise specifically bequeathed, should be distributed in part among the children and grandchildren of testator who might be living at the death of *Julia A. Crosby* by one distribution, and by another distribution three years later the whole residue should be distributed among his children and grandchildren then living.

Are these provisions inconsistent with the intention on the part of the testator to continue his personal estate in the hands of his executors in trust past these periods fixed for distribution and until all the grandchildren of testator, if any there be living at the death of the last living child of testator, have died, and so preserve the legacies for *Nashotah House,* Christ's Church, and the bequest to testator's half brothers and sisters? We think they are. The fact of distribution at a time certain to arrive must have loomed up larger in the mind of this layman than mere legal forms of expression. The principal disposition of his personal property had more weight and significance with him than the alternative disposal or the alternative payment of legacies. *Colby v. Doty,* 158 N. Y. 323, 53 N. E. 35. It cannot be presumed that after distribution among his children of this personal property he intended there should continue restrictions on its use, enjoyment, and disposal, and that at the end of the life of the survivor of his children or grandchildren, notwithstanding this distribution, a claim should accrue or continue in favor of the appellants or either of them. "In the event of the death of all my children and any and all children or heirs being their descendants, $5,000 is hereby donated to Nashotah Theological Seminary." This is the language of testator with reference to that legacy. "Neither of these donations are binding or to be paid unless in the

case of the death of all my said children and their heirs meaning in (any) children or grandchildren that may be born thereafter." "The rest of my property real and personal, in the event of the death of all my children and their children or heirs, is to be share and share alike divided between my half-brothers and half-sisters." This is apparently not intended to apply to the death of testator's children and all their heirs during the lifetime of the testator. The words, "and all children or heirs being their descendants," forbid this interpretation, as also do the words "my children and their children or heirs." Neither is it probable that the testator intended thereby an indefinite failure of issue.

The construction given by the circuit court seems to us the most reasonable and to accord best with the probable intention of the testator. As we understand that construction, if there is at the time of the first distribution, to wit, at the death of *Julia A. Crosby,* any child of the testator living or any child or children of any child of the testator living, the appellants receive nothing from the amount to be then distributed; and if at the time of the second distribution, three years after the death of *Julia A. Crosby,* there is any child of the testator living or any child or children of any deceased child of the testator living, appellants take nothing out of this final or residuary distribution or out of any property of the testator except the five shares of the stock of the First National Bank of Racine. But if at the time of the first distribution there is no child of the testator or issue of any such child deceased living, the appellants take as provided in the will, and in case they do not at that time take because of the existence of some child of the testator or issue of such child deceased, they will take under the will at the time of the second distribution if at that time there is no child of the testator or issue of any such deceased child living.

By the Court.—Judgment of the circuit court is affirmed.

DONAHUE, Appellant, vs. GUNTER, Respondent.

March 17—April 5, 1910.

Appeal: Questions of fact: Recitals: Bill of exceptions: Disregarding irregularities: Stipulations: Performance prevented by other party: Sheriffs: Moneys deposited under stipulation: Application: Pleading: Demand for excessive relief.

1. Recitals of fact in the decision and judgment of the trial court will, on appeal, be assumed to be true where there is no bill of exceptions.
2. If in such a case the facts recited sustain the judgment it should be affirmed, notwithstanding an irregularity in that the action was dismissed upon motion after the case was at issue and before it was reached for trial.
3. Where money was deposited with the sheriff by a judgment debtor pursuant to a stipulation between the creditor and debtor that it should be applied upon the judgment "in the event of said debtor neglecting and refusing to file" an undertaking on appeal within a certain time, and three days before that time expired a good and sufficient undertaking was served on the attorney for the creditor and was retained by him for his own convenience until after the time fixed for filing had expired, but was filed by the debtor immediately upon its being returned to him, the creditor cannot be heard to say that the debtor *neglected and refused* to file the undertaking pursuant to the stipulation.
4. The money in such case being deposited with the sheriff as a mere stakeholder and not collected by him on execution, sec. 2894c, Stats. (Laws of 1905, ch. 132), has no application.
5. Where money is paid to and accepted by a sheriff pursuant to a stipulation between the parties to a judgment, he is a party in fact to such stipulation although he does not sign it, and is not justified in applying or paying over the money otherwise than in accordance with the terms of the agreement.
6. One entitled to the return of at least a part of a sum deposited by him should not be denied recovery because in his complaint he demands the entire sum.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

On January 7, 1909, one M. G. O'Donnell obtained a

judgment in a tort action against the plaintiff for $283.18 damages and costs. On January 12, 1909, execution was issued on said judgment, which was returned unsatisfied on the 22d. On January 23d execution was issued against the body of the plaintiff and he was arrested by the defendant, who was the sheriff of Kenosha county. Thereupon the following stipulation was signed by the attorneys for the respective parties:

"It is hereby stipulated and agreed by and between the attorneys for Michael G. O'Donnell, plaintiff, and *Edward Donahue,* defendant, that said defendant who has been arrested upon execution against the body, and is now in the custody of the sheriff of Kenosha county, that upon the said *Donahue,* defendant, depositing with the said sheriff the sum of three hundred and twenty-five (325) dollars, until the said *Donahue* shall file an undertaking, with sufficient sureties, as required by law, then and in that case the said sheriff may release the said *Donahue,* defendant, and after the filing of said undertaking, with good and sufficient sureties, the amount so deposited shall by said sheriff be returned to the said *Donahue,* defendant, and in the event of said *Donahue* neglecting and refusing to file undertaking with good and sufficient sureties within sixty (60) days from the 8th day of January, 1909, then said amount so deposited shall be applied on said plaintiff's judgment, unless the defendant, for cause satisfactory to the court, shall procure an extension of said time.

"Dated at Kenosha, January 23, 1909."

The plaintiff prepared appeal papers and served the same with the undertaking on the attorney for O'Donnell on March 6, 1909. Such attorney desired to retain the undertaking for the purpose of submitting it to his client, although he admitted service thereon as of March 6th. It is alleged in the complaint that such undertaking was not returned to the plaintiff's attorney until 8 o'clock in the evening of March 9, 1909, although demand therefor had been made, and that it was then too late to file it with the clerk of the

court before the following morning. Upon filing such undertaking the plaintiff demanded the return of the money deposited with the defendant, which demand was refused, and it appears from an allegation of the answer that on March 17, 1909, the money was applied in satisfaction of the judgment. The complaint contains allegations to the effect that the parties by stipulation voluntarily extended the time for filing the undertaking, and also that the undertaking was in fact filed before March 10th.

Plaintiff brings this action to recover from the defendant the sum of $325 deposited with him under the aforesaid stipulation. The answer sets up as a defense the failure of the plaintiff to file the undertaking within the time provided for in the stipulation, and also failure to secure any extension of time from the court within which the same might be filed, and asserts that the defendant complied with his full duty under the terms of the stipulation in making the disposition which he did of the money in his hands. Before the case was reached for trial the defendant made a motion to dismiss the action, which motion was granted, and from the judgment dismissing the same this appeal is taken.

For the appellant there was a brief by *John C. Slater*, and oral argument by *George Kroncke*.

Calvin Stewart, for the respondent.

BARNES, J. The practice pursued in this case, to say the least, was irregular. After the case was at issue, but before it was reached for trial, the defendant moved the court to dismiss the action and the motion was granted. The complaint clearly states a cause of action, and unless some proof was offered or some admissions were made on the hearing of the motion it should have been denied. No bill of exceptions was settled in the case, so that all we have before us are the pleadings, the decision of the court, and the judgment. The recitals of fact in the decision and judgment we must

assume to be true, and if they support the judgment it should be affirmed under ch. 192, Laws of 1909 (sec. 3072*m*, Stats.), notwithstanding the irregularity referred to. There are some admissions contained in the answer which are not negatived by the recitals of the court, and which, we think, may properly be considered. It is there set forth that the defendant did not satisfy the execution out of the money in his hands until March 17, 1909, and that the plaintiff did not demand the return of his money until the morning of March 10th, being the day after the time for filing the undertaking had expired under the terms of the stipulation. The court found that the undertaking was not filed until March 10th; that no application had been made to the court to extend the time for filing it; that the undertaking was executed and submitted to the attorney for the judgment creditor and was by him approved as early as March 6th; that under sec. 2894*c*, Stats. (Laws of 1905, ch. 132, sec. 2), no action could be maintained against the defendant; and that in any event, the undertaking not having been filed within the time provided for in the stipulation, the defendant was within his right in using the money to satisfy the execution. The court does not expressly find why the undertaking was not filed sooner, but does say:

"It is urged that the reason the undertaking was not filed within sixty days was that the same was retained by counsel for O'Donnell; but inasmuch as it is conceded that the undertaking was approved by said counsel March 6, 1909, the reason submitted is not considered sufficient to excuse noncompliance with the terms of the stipulation regarding the filing of the undertaking."

This statement would indicate that on the hearing of the motion no showing was made that controverted the allegations of the complaint to the effect that, although O'Donnell's attorney approved of the sureties on the undertaking, he desired to retain it until he could submit it to his client, who was a practicing attorney, and that he retained the same in

his possession until 8 o'clock of the evening of March 9th, although demand was made on him to return it sooner, and that it was then too late to file it until the morning of March 10th. The complaint also alleges that before he satisfied the execution the defendant was advised of the reason of the delay in filing the undertaking. No finding of fact is made on this question.

It will thus be seen that the appeal involves two propositions: (1) Was the sheriff justified under the circumstances in making the disposition of the money which he did? (2) If he was not, can plaintiff maintain this action against him?

With the meager facts we have before us, the first question is not as easy of solution as it otherwise might be. It seems certain that the plaintiff attempted in good faith to file his undertaking and perfect his appeal within the sixty-day period. It further appears that a good and sufficient undertaking was served on the attorney for the judgment creditor three days before that time expired, and we further think it must be assumed that the undertaking was retained by such attorney for his own convenience or for that of his client until it was too late to file it before the morning of March 10th. Now, the terms of the stipulation were that, in the event of the plaintiff *"neglecting and refusing"* to file the undertaking within sixty days from January 8th, the money deposited with the defendant should be applied in satisfaction of the judgment. The conditions of this stipulation were binding on the defendant. Can it be said that the plaintiff neglected and refused to file the document? It cannot be held that he refused to do so, although he may have been guilty of some neglect in not either insisting on its earlier return or moving the court for an extension of time in which to file. When service was made three days before the time within which to file would expire, and the party on whom the service was made retained the document for his own convenience, and

neglected or refused to return it, he should not be heard to say that the other party had "neglected" or "refused" to comply with the stipulation, until he had placed such party in a position where he could do so. *Case v. Beyer, post,* p. 496, 125 N. W. 947. It is a fair assumption that the defendant knew of these facts. It was his business to know before he parted with the money whether the plaintiff had *neglected and refused* to file the stipulation or had been prevented from so doing by the judgment creditor. We conclude that the plaintiff was excused from filing the undertaking at an earlier date than he did, and that the defendant was not justified under the terms of the stipulation in making the disposition of the money which he did. This conclusion is reached on the meager facts before us.

We do not regard sec. 2894*c*, Stats. (Laws of 1905, ch. 132), as having any application to the case. The sheriff did not collect the money deposited with him on execution. It was deposited with him as a mere stakeholder to be disposed of according to the agreement of the parties. They had the right to make the agreement which they did. If the statute in question applies, the defendant could not return the money to the plaintiff if the stipulation had been complied with the day after it was made. The money might as well have been deposited with a person who was not an officer as with the defendant. It being admitted that the money was paid over and accepted under the stipulation, its terms were binding on the defendant. He had no right to disregard the agreement to which he was a party in fact, although he did not sign it. If he did not wish to accept the money under the conditions upon which it was left with him, he should have refused it.

Moreover, the amount due upon the judgment, with interest and costs, as appears from the answer, was $304.01 when the judgment was satisfied. The amount deposited with the defendant was $325. We think the plaintiff was

clearly entitled to a return of $20.99 on any view of the case, and that the plaintiff should not have been denied recovery because he demanded the entire sum in his complaint.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

SIEBECKER, J., dissents.

RUNYARD and others, Appellants, vs. OETTING BROTHERS ICE COMPANY, Respondent.

March 18—April 5, 1910.

Navigable waters: Drainage laws: Lowering level of meandered lake.

1. Ch. 64, Laws of 1871, authorizing the draining of marsh, swamp, or overflowed land, etc., did not authorize the construction of a ditch which would lower the level of a meandered lake, navigable under sec. 1596, Stats. (1898).
2. Property owners upon a navigable lake have the right to have the natural level maintained, and also to have the assistance of a court of equity, if necessary, to accomplish that end.

APPEAL from a judgment of the circuit court for Kenosha county: GEO. W. BURNELL, Judge. *Affirmed.*

This is an action in equity by owners of certain lowlands in the vicinity of Camp Lake, Kenosha county, to restrain the defendant from maintaining a dam across a certain ditch which extends from said Camp Lake to Channel Lake in Lake county, Illinois. The defendant, a corporation owning lands bordering on said Camp Lake, seeks by counterclaim to restrain the plaintiffs from interfering with said dam. The action was tried by the court. The facts as found by the court were in substance as follows:

Camp Lake is a shallow, meandered lake in the town of

Salem, Kenosha county, some hundreds of acres in extent, which prior to 1874 was drained by a small natural stream of water flowing from the south side of the lake in a southerly direction and finally emptying into Channel Lake aforesaid. The land on the south side of Camp Lake and for some distance southerly is low and swampy, and the plaintiffs own a considerable part of this swampy land, the land of the plaintiffs *Faulkner* and *Schreck* bordering on the lake. The defendant since 1898 has been the owner of a parcel of land fronting on the lake, on which it operates large icehouses and a summer resort hotel, both of which owe their special value to the proximity of the lake. In 1874 proceedings were begun, by the filing of a petition with the supervisors of the town of Salem, to open and establish an artificial ditch running south to the state line and there connecting with another ditch in Illinois, the object of the proceeding being, as stated in the petition, to drain the wet and marsh lands contiguous to Camp Lake and improve the public highway contiguous to said wet and marsh lands. A hearing was had on the petition, assessments of benefits were made, and the supervisors made an order by which it was determined "to establish said ditch, drain, or watercourse, if it shall appear practical after being surveyed." No further or other order appears in the town records; but a survey and plat of the ditch was made, and the ditch, about twelve feet wide, from the lake to the state line, was dug by contract during the year 1874, and resulted in lowering the lake from fifteen to eighteen inches below its natural level. No further work was done on the ditch, except an occasional pulling of weeds and some minor work on the south end, until 1901.

Within six to eight years after the first digging in 1874 the ditch was so far filled up by the washing in of dirt and growth of vegetation that the water in the lake was restored to substantially its former level. In 1901 certain of the plaintiffs employed two men to clean out the ditch. These

men not only cleaned out the old ditch, but dug out twelve to eighteen inches of clay from the bottom for a considerable distance, which was an entirely new digging and would have lowered the lake to that extent; but at about the same time the defendant built a concrete dam at the head of the ditch adjoining the lake on the land of one of the plaintiffs, without objection by any one, which, with certain auxiliary dams built a little further south, kept the water of the lake up to its natural level until the year 1906, when some person blew up the concrete dam, with the knowledge and consent of some or all of the plaintiffs. The effect of this was to lower the water in the lake some three feet, leaving the defendant's icehouse and other buildings far away from the water. The effect of the maintenance of the ditch as it was after the removal of the dam would be to destroy the lake as a navigable lake as well as its value for summer resort and ice purposes, and leave a large expanse of the bottom of the lake bare.

From these facts the court concluded that defendant was entitled to judgment directing the plaintiffs to fill the ditch so far as necessary to raise and keep the water in the lake at its natural level, or, in case they fail to do so, that the defendant be permitted to do so at plaintiffs' expense, and that plaintiffs be enjoined from doing any act or thing in the way of the opening or maintenance of the ditch in the future in such manner as to lower said lake. Judgment being entered in accordance with the finding, the plaintiffs appeal.

For the appellants there was a brief by *Peter Fisher* and *Ryan, Merton & Newbury,* and oral argument by *Mr. Fisher* and *Mr. T. E. Ryan.*

T. W. Spence and *A. C. Miller,* of counsel, for the respondent.

WINSLOW, C. J. The findings of fact made by the trial judge are amply sustained by the evidence, and it is not deemed necessary to review them.

A number of interesting legal questions were raised and debated by counsel, both in their briefs and upon the oral argument, but we shall consider but one question, which we deem decisive of the case. Camp Lake was meandered by the government, and hence is to be considered as a navigable body of water. Sec. 1596, Stats. (1898). This court has very recently held, after full discussion, that drainage laws which authorize the draining of swamp or overflowed lands for the promotion of the public health or welfare do not authorize the draining away of the waters of the state which have been declared navigable. *In re Horicon D. Dist.* 136 Wis. 227, 116 N. W. 12. Whether the legislature has power to pass a law authorizing the draining of such waters was left undetermined in the case just cited, but it was definitely determined that it could not be done under a law which did not purport to authorize anything more than the drainage of swamp lands.

This principle is conclusive in this case. If it be conceded that the ditch proceedings in 1874 were in every way legal, they could not justify the construction of a ditch which would lower the natural level of Camp Lake, because it was a meandered, navigable lake; and ch. 64 of the Laws of 1871, under which the proceeding was instituted, only purported to authorize the draining of marsh, swamp, or overflowed land, or straightening or enlarging a watercourse.

This conclusion relieves us from the consideration of any other questions. Property owners upon this navigable body of water have the right to have the natural level maintained, and also to have the assistance of a court of equity if it be necessary to accomplish that end.

By the Court.—Judgment affirmed.

LINCOLN and others, Respondents, vs. CHARLES ALSHULER MANUFACTURING COMPANY, Appellant.

March 18—April 5, 1910.

Sales: Executory contract: Breach by vendee: Damages: Right of vendor to sell the goods: Sale on credit: Insolvency of vendee: Rights of vendor: Appeal: Harmless error: Form of action.

1. If an executory vendee refuses to carry out his agreement to purchase a specified quantity of manufactured goods not identified and made specific at the time of the agreement nor thereafter before the refusal, the remedy of the executory vendor is for damages for the breach, not for the purchase price.
2. The foregoing follows the rule that, ordinarily, any person has the right to breach his mere executory agreement and submit to legal damages therefor.
3. The situation supposed in No. 1 is unlike where there is a sale *in præsenti*, there having either been a transition of title or something equivalent thereto before the breach; or where an article to be manufactured to order, prior to the breach, was, in whole or some substantial part, created and has no general marketable quality. It is one where the particular goods to satisfy the agreement have not, prior to the breach, been segregated from a stock of such goods, or the materials for the manufactured product are yet to be acquired by the executory vendor or are on hand as ordinary manufacturer's stock, and are available to such vendor without special loss either for sale or incorporation into manufactured articles for others.
4. In such a case the general rule applies that recoverable damage is limited to such as may be reasonably said to have been in mutual contemplation at the inception of the contract as the probable result of a breach of it.
5. The more particular rule applicable to the situation supposed is that the recoverable damage is the difference between the agreed price and the fair market value of the property at the time of the breach and place for delivery, subject to the exception that in case of there being no such market value at such place, such value may be determined at some other place, just to the executory vendee.
6. Where a mere agreement to purchase is repudiated by the executory vendee before tender of the subject of sale or before the executory vendor has done all required of him in order to a

transition of title, he cannot liquidate his damages by selling the subject, or an ostensible subject, of the agreement as the property of the executory vendee, but a sale fairly conducted by him of the actual, or a similar, subject might create evidence on the question of damages.

7. In case of an executory contract to sell and deliver goods on credit, the seller may, if in the meantime the purchaser becomes insolvent or shows evidence of incapacity to pay for the property, by defaulting on existing indebtedness, eliminate such element and treat the contract as an agreement for a cash sale.

8. In the circumstances stated in the last foregoing, the executory vendor cannot eliminate any other element than that of credit; the feature as to time and place of delivery, he must comply with, at his peril of being liable for a breach.

9. In an action, in form, to recover the purchase price of chattels, where the cause of action is in fact for damages for breach of the agreement to purchase, a recovery, in form, upon the theory of the pleader will not be disturbed on appeal if the record shows the judgment is not in excess of the amount plaintiff would have recovered had he proceeded in the proper way.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Modified and affirmed.*

Action, in form, to recover a balance due on contract, with some allegations in the complaint appropriate to an action for damages for nonfulfilment of an agreement to purchase. The issues were thus decided as to facts: (1) Plaintiffs sold defendant and defendant purchased from plaintiffs, on July 20, 1907, fifteen cases of cheviot cloth, to be manufactured and delivered at seven and one-quarter cents per yard, five cases October 5, 1907, five cases November 15, 1907, and five cases December 15, 1907, of which the first five were delivered and paid for, and also sold defendant and it purchased twenty-five cases of like goods about July 24, 1907, for December, 1907, delivery. (2) The place of delivery agreed upon was defendant's factory at Racine, Wisconsin, or other factories to be designated by it. (3) Under the agreement, shipping directions were necessary and de-

fendant agreed to give such. (4) Defendant refused to give shipping directions for any of the goods subsequent to shipment of the first five cases which were duly forwarded and paid for, and refused to receive the balance or any part thereof, wherefore plaintiffs were prevented from making delivery though they were ready and willing to do so, which defendant well knew. (5) April 1, 1908, plaintiffs notified defendant that, unless it received and paid for the balance of the goods by April 10th thereafter, they would sell the same in the open market for the best price obtainable and hold defendant for any deficiency between the amount received and the sale price. Pursuant thereto, July 27th thereafter, plaintiffs sold the goods, using reasonable care to obtain the best price practicable, realizing $4,032.16, which they applied upon the sale price, leaving $1,447.36, subject to the freight charges which plaintiffs would have had to pay, had the goods been accepted at the agreed destination, or a net loss of $1,287.82.

Upon such facts the court concluded that plaintiffs were entitled to recover of defendant the aforesaid balance with interest, amounting to $1,484.55, and costs. Judgment was entered accordingly.

The finding that there was a sale of goods to defendant was based on the making and acceptance of two orders, each in this form:

Sold to *Chas. Alshuler Mfg. Co.*
Racine, Wis.
Terms 2–10 60 ex.
Ship frt. pd.
Bill Dup.
Bill Lading.
Shipments as below.
15 cs. Saxon Cheviots
blue @ 7¼
5 Oct. 15
5 Nov. 15
5 Dec. 15
Pack in cases.
2000 yds.
Accepted for Seller. W. A. West.
Accepted for Buyer.

The only difference between the two orders was the number of cases and time for shipment.

The evidence was to this effect: Shipping orders were given as to ten cases, but there was delay in the matter on the part of plaintiffs. Before plaintiffs were ready to make shipment they were informed by defendant that, on account of the financial condition of the country and its condition in that respect, it would be unable to take the twenty-five cases and requested plaintiffs to consent to a cancellation of the order therefor. At such time defendant was in default to plaintiffs on the theory that it was bound to pay for goods at dates specified in the order, whether they had been forwarded or not. On such theory plaintiffs refused to ship the ten cases, at the same time refusing to cancel the order for twenty-five cases. Many communications passed between the parties, defendant at no time refusing to take and pay for the ten cases when delivered as agreed upon, but insisting that it would not take any of the twenty-five cases, resulting in plaintiffs refusing, under any circumstances, to cancel the order therefor, and refusing to ship the ten cases except upon payment therefor, and defendant persisting in its refusal to accept any of the twenty-five cases, and requesting plaintiffs to dispose of them for its account, because of their superior opportunity for realizing thereon. In that situation plaintiffs renewed their refusal to consent to a cancellation of the order for the twenty-five cases, continued to neglect to ship, or offer to ship the ten cases, and demanded payment for the entire thirty-five cases, but offered to consider any proposition made to give defendant additional time. Thereupon, and on March 19, 1908, defendant notified plaintiffs that it would take the twenty-five cases, paying therefor by July 31st upon condition of the goods being perfect in every particular and freer from defects than goods previously shipped, and on such condition ordered shipment of five cases at once. Plaintiffs thereupon positively refused to ship any goods in

advance of payment for the whole thirty-five cases and sent their account to defendant accordingly, making claim for the full delivered price and on over 4,000 yards of goods in excess of thirty-five cases of 2,000 yards each, following it by a draft, which was refused payment. Prior to such refusal plaintiffs declined to forward any of the ten cases though they had in hand urgent shipping orders therefor, till the draft was paid. Thereafter circumstances occurred detailed in the findings respecting sale of thirty-five cases of goods, corresponding as to amount of cloth therein to the bill as aforesaid, ostensibly as defendant's goods and on its account, liquidating their pretended claim to the amount found by the court, for which judgment was rendered.

For the appellant there was a brief by *Kearney, Thompson & Myers,* and oral argument by *W. D. Thompson.*

For the respondents there was a brief by *Simmons & Walker,* and oral argument by *M. E. Walker.*

MARSHALL, J. This case seems to have been disposed of on a wrong theory. The contracts, notwithstanding words of sale *in præsenti,* were obviously mere agreements to sell in consideration of agreements to purchase. They did not contemplate the passing of title to the goods till arrival at the delivery point in Wisconsin, freight paid. Therefore, as the goods were never so delivered or tendered, the contingency never happened rendering it competent for respondents to sell the goods as the property of appellant. They merely sold their own property.

Again—as the contracts were mere agreements to sell and agreements to purchase; neither sales *in præsenti,* nor agreements to manufacture and sell specific articles, or sell specific identified articles, but to sell quantities of goods, manufactured or unmanufactured at the time, of the ordinary output of the factory, and the second agreement was not only repudiated by the executory vendee before any goods called for

thereby were set aside as its particular goods, but before they were tendered at the delivery point, so that the contracts were never completed by the executory vendors so as to enable them to treat the property as, in any sense, that of such executory vendee, and, after its repudiation, the second contract could not have been performed by such vendors so as to enable them to treat the goods as property of such vendee or enhance its liability for the breach—respondents' cause of action was not for a balance due upon a sale of goods, but for damages for breach of contract, determinable as of the time of the breach, and limited according to the familiar rule that such damages can only be such as may be reasonably considered to have been in mutual contemplation by both parties at the time of making the contracts as the probable result of the breach thereof. *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119; *Serfling v. Andrews,* 106 Wis. 78, 81 N. W. 991; *Malueg v. Hatten L. Co.* 140 Wis. 381, 122 N. W. 1057.

The optional rights of action suggested in *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368, do not all apply to such a situation. There the article was specially manufactured and set aside for the vendee at the delivery point so it was competent for the vendor to deal therewith as the property of such vendee. Here the goods could not be dealt with as property of the executory vendee without its consent till the executory vendors had done everything on their part, so that in a case of destruction of the goods by fire or otherwise the loss would have fallen on the former because of the title having passed.

The rule formulated in *Pratt v. S. Freeman & Sons Mfg. Co., supra,* is elementary, but was there adopted, as to its phrasing, from *Van Brocklen v. Smeallie,* 140 N. Y. 70, 35 N. E. 415, where the facts were that the title to the property had actually passed to the vendee, leaving nothing executory but the mere act of delivery. The court held that the rule

applies in cases where the title passes *in præsenti* and where the contract is executory, but the property is identified, and there is a valid tender as contemplated in the sale contract and a refusal to perform. The facts of this case do not satisfy either of such situations. The title did not pass at the date of the contract, the property was never tendered at the agreed place of delivery and was not specific prior to the breach.

Again, it is an elementary principle that, in case of a bargain and sale of goods, not specific, and before they are set aside for the vendee, he notifies the executory vendor that he elects to and does cancel the contract and will not receive the goods, he cannot be made liable for the purchase price, as on a sale of goods, but only for damages for his breach of contract. That being upon the theory, often declared, that, ordinarily, any person has a right to breach his mere executory agreement and submit to damages therefor. *Ward v. Am. H. F. Co.* 119 Wis. 12, 96 N. W. 388; *Malueg v. Hatten L. Co., supra. Unexcelled F. W. Co. v. Polites,* 130 Pa. St. 536, 18 Atl. 1058, is a good illustrative case.

The facts in the last case cited are on all-fours with those in this case. The court remarked that:

"Whilst the manifest tendency of the cases in the American courts, now, is to the doctrine that when the vendor stands in the position of a complete performance on his part, he is entitled to recover the contract price as his measure of damages, in the case of an executory contract for the sale of goods not specific, the rule undoubtedly is that the measure of damages for a refusal to receive the goods is the difference between the price agreed upon and the market value on the day appointed for delivery." And the court might well have added, to accurately round out the rule, at the place of delivery.

In this case, as before indicated, the agreements were with reference to goods from the ordinary output of a manufactory to be selected from stock to be accumulated or on hand.

That is plain. The second agreement was repudiated about a month and a half before expiration of the time for delivery and some three weeks before delivery could have been requested. It is very evident that no goods had been set aside for appellant, even at the necessary starting point of the contemplated transit, prior to the notification that the second agreement would not be carried out by appellant. It may well be that if they existed at all it was as a part of the general stock. So respondents, in any view, never had a cause of action against appellant for the contract price of the twenty-five cases of goods.

As to the ten cases it seems the finding that appellant refused to receive them is contrary to the evidence. As we read the record, appellant ordered the ten cases forward, urgently, but respondents refused to send the same without prepayment, not only for the ten cases, but for the thirty-five cases. In face of the letters found in record ordering forward the ten cases and the reply, in effect, refusing to ship except upon condition of payment for the thirty-five cases, it is not perceived how the finding that shipments were not made because no shipping directions had been given, and because appellant had refused to receive any of the goods, has any support whatever. The declination to ship the ten cases, was upon the sole ground that the sale price for the whole thirty-five had not been paid. The court must have assumed that circumstances existed when the goods were ordered forward, authorizing the executory vendors to eliminate the element of credit and demand prepayment before parting with possession of the goods, under the familiar rule applied in *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368, though there is no finding of insolvency or of any fact justifying even the elimination from the contract of the element of credit.

True, in case of an executory agreement for sale of property on credit, if before the time for delivery the executory

vendee becomes insolvent, or shows evidence of insolvency by defaulting in payment of existing indebtedness, he may insist upon completion of the sale contract, eliminating the element of credit, but not eliminating any other element of the contract, as that in this case to deliver the subject of the sale f. o. b. cars at a point distant from the location of the goods at the time of the sale or that of the contemplated commencement of the transit to the purchaser. Much less can the vendor, as was done here, not only eliminate the element of credit, but a material part of the contract in addition by imposing the condition of payment for goods under other contracts, especially goods not recoverable for, in any event, because of the agreement to purchase the same having been seasonably repudiated, leaving the vendor only his action for damages. So the record not only does not support the finding, but negatives any right to recover on the first contract either the purchase price of the goods or damages for breach of contract. That contract was breached by respondents, not by appellant.

As to the twenty-five cases, it seems the finding that appellant repudiated the contract is well supported, and also the evidence seems conclusive that appellant never after first taking that attitude changed it by agreeing to take the goods as promised, or withdrew the request for respondents to liquidate their damages by selling the goods in their discretion for its account. It is quite likely that had appellant, after breaching the contract, seasonably changed its attitude, respondents would have refused to start the goods for delivery at the agreed termination of the transit, only eliminating the element of credit, so as not to lose control of the property before receiving payment therefor or stood ready to do so, but would have insisted upon payment before starting the goods on the journey, in which case they could not have recovered damages, but on the contrary might have been liable for damages for their breach of contract. How-

ever, that course was not taken so the right of respondents to reimbursement for damages for the breach, which became fixed by the refusal to receive the goods before and at the agreed time for forwarding, remained to the end.

The measure of damages, by the ordinary rule, is the difference between the amount the appellant agreed to pay for the goods and the reasonable market value thereof at the agreed delivery point in Wisconsin at the time of the breach, less the freight, which respondents agreed to, but did not, under the circumstances, have to pay. That is subject to the exception that where there is no fair market value at the delivery point, such value may be determined at some other point, just to both parties, which in this case not only seems, as above, to have been the place where the goods were sold, but the one consented to by appellant by the request for a sale thereof on its account.

It must be remembered that this is not a case of manufacture of an article to order, which was not a stock article having a general marketable quality, in which case sometimes the full price is the measure of damages for breach of the contract to accept after the article has been completed, or substantially so, nor a case where the article though of a general marketable quality was completed and ready for delivery before the breach. It is a case where, so far as the record shows, while the material for the proposed sale was still the property of the executory vendors and in their hands, or the subject formed part of the general stock of manufactured goods at the factory, the vendee refused to perform. In such a case the profits on the contract, is the true measure of recovery.

Now while this was not a case for liquidation of damages by a sale of goods, substantially as property of the vendees, as in *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368; *Van Brocklen v. Smeallie,* 140 N. Y. 70, 35 N. E. 415; and *Moore v. Potter,* 155 N. Y. 481, 50 N. E. 271, appellant has no reason to complain, (1) because it con-

sented, in advance, to such liquidation; (2) because, in any event, such a sale is, in effect, only a manner of making evidence of damages, which in this case, were the same whether the action be regarded as one on contract for balance of the purchase price, or for mere damages for breach of contract; and (3) because the evidence shows that the sale price was the fair market value at the place of sale and in excess of what could have been obtained at the agreed delivery point, or at the nearest point thereto where the goods were fairly marketable.

Again, while the time the market value was determined as a basis for recoverable damages, was several months after the date of the breach, which fixed the rights of the parties, that is rather to appellant's advantage than otherwise, since the evidence is to the effect that property of the sort increased in value in the meantime, rather than decreased.

Further, while the action was for the balance of the purchase price for goods instead of a mere action for damages for breach of contract, as it should have been, that is not to appellant's prejudice, since the recoverable amount, under the circumstances, would be no different in one case than in the other.

It follows that the judgment must be considered as one for damages for breach of contract to buy goods and erroneous as to the ten cases. It must, therefore, be reduced as of the time of its rendition to the extent of two sevenths, to wit, to the sum of $1,060.40, and further reduced by the amount of the damages awarded on the excess of goods in the twenty-five cases over 2,000 yards per case, which seems to be 4,096½ yards, on which damages were incorporated in the judgment, including interest, of substantially $79.49, making the amount for which judgment should have been rendered $980.91, to which sum it is reduced as of its date. As so reduced it should be affirmed.

By the Court.—So ordered.

GORSEGNER, Respondent, vs. BURNHAM, imp., Appellant.

March 18—April 5, 1910.

Master and servant: Unsafe working place: Duty of master: Repairs: Concurrent negligence of fellow-servant: Appeal: Orders reviewable.

1. **The duty of the master to make the working place of a servant reasonably safe does not cease because of the fact that repairs are in progress upon the structure in which the work is being done, where the servant is not himself participating in the making of such repairs.**
2. **The master is liable for injuries to a servant caused by the negligence of a fellow-servant where such negligence was merely concurrent with and rendered effective by a defect in the place of work.**
3. **An appeal from an order does not bring up for review other orders made in the same action.**

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The defendant owned and operated a brickyard consisting of a series of ovens or chambers ten or twelve feet in height, thirty feet long, and fifteen feet wide, composed of arches constructed of fire brick in which brick were placed to be baked and, of course, when baked were removed. Plaintiff was a common laborer, of mature age and considerable experience, whose work included the removal of the brick from these arched ovens. At the time in question one of the arches was found to have been weakened by fire and it was determined to pull down and rebuild about three fifths of it in width. Meanwhile the remaining two fifths had been braced by planks running longitudinally and supported by posts, such planks being approximately one foot in width and leaving unsupported spaces between them about fifteen inches in width. The defective side of the arch had been torn down preparatory to rebuilding. It does not appear by whom such work had been done nor how long before the ac-

cident. Plaintiff, in the course of his work, was sent into this chamber to wheel away the old brick therein; whether the merchantable brick which had been baked therein, or the old fire brick of the arch which had been torn down, does not appear. While engaged in such work some portion of the old arch, together with the covering of clay, fell in upon him and caused his immediate death. There is evidence that some work on top of the arch and outside was in progress, and it is contended by appellant that one of the men negligently stepped on the weakened arch and caused its collapse.

At the close of plaintiff's evidence defendant's motion for a nonsuit was granted and jury discharged. Before entry of judgment plaintiff moved to vacate such order for nonsuit and to grant a new trial, which motion was granted on the ground that upon review of the evidence the trial court was of the opinion that there should have been submitted to the jury the question as to whether the remaining portion of the arch was so properly supported as to make the place where the decedent was put at work reasonably safe, in view of evidence of the existence of an extended crack therein. From the order granting a new trial the defendant *John Q. Burnham* appeals.

For the appellant there was a brief by *Doe & Ballhorn*, and oral argument by *J. B. Doe*.

For the respondent there was a brief by *Ryan, Ogden & Bottum*, attorneys, and *Hugh Ryan*, of counsel, and oral argument by *Mr. Ryan*.

Dodge, J. There was evidence tending to establish that the chamber in which deceased was at work was a permanent structure prepared by the master and in which employees were expected to perform labor in no wise connected with either the construction, repair, or maintenance of the building, from which would result to the master the duty to make it reasonably safe for the performance of such labor. *Ein-*

gartner v. Ill. S. Co. 94 Wis. 70, 68 N. W. 664; *Lipsky v. C. Reiss C. Co.* 136 Wis. 307, 117 N. W. 803. This duty in no wise ceased because of the fact that repairs were in progress. That, at most, would be one of the circumstances bearing on the question of what would constitute reasonable safety and on the measure of notice to an employee of the existence of some defects or perils. The duty persisted to make the place reasonably safe. We are convinced that the trial court might well have found evidence which would justify submission to the jury of the question whether the roof as it existed upon the morning when decedent was directed to do work under it was reasonably safe, in view of the evidence of an extensive crack therein and of the degree and manner of shoring up which existed. Indeed, one witness testified that if he had known of the crack he would not have considered the bracing of the roof sufficient for safety. There is no direct evidence that the deceased had any knowledge of these perils, and the conditions surrounding his work are left in so much of confusion that the trial court might well have hesitated to charge him as matter of law with such knowledge as to impute to him assumption of the risk. We do not ignore that modification of the master's duty to provide a safe place in the case of workmen together engaged in gradually altering such place of work, as in the case of construction or repair, illustrated in such cases as *Kath v. Wis. Cent. R. Co.* 121 Wis. 503, 99 N. W. 217; *Walaszewski v. Schoknecht,* 127 Wis. 376, 106 N. W. 1070; and *Strehlau v. John Schroeder L. Co., ante,* p. 215, 125 N. W. 429. But the evidence is by no means clear that the decedent's employment had any connection whatever with either the demolition, the shoring up, or the re-erection of this arch; indeed it tends to show that the reconstruction was being performed by independent contractors with whom decedent had no connection, and that the particular portion of the work consisting in the tearing down of a part and shoring up of the other

part had been done some days before without decedent's participation therein.

Another fact pressed on our notice by the appellant is that some one engaged in assisting the masons, who were building another part of the arch, caused the collapse by stepping on the weakened portion. But there was evidence that it was customary for employees to pass over these arches, from which would result the duty of the master to contemplate such acts in performing its duty to properly support such roof for the safety of those who might have occasion to work under it. Further than this, however, the rule is thoroughly well established that even negligence of a fellow-servant, when merely concurrent with and rendered effective by a defect in the place of work, makes the master liable. *Winchel v. Goodyear,* 126 Wis. 271, 105 N. W. 824; *Howard v. Beldenville L. Co.* 129 Wis. 98, 99, 108 N. W. 48; *Herring v. E. I. Du Pont de Nemours P. Co.* 139 Wis. 412, 121 N. W. 170. As a result of the examination of the entire record we are unable to say, with the certainty requisite to the reversal of a trial court's decision upon evidence, that there was none to establish the defendant's negligence and consequent liability, nor that either assumption of the risk or contributory negligence on the part of the deceased was established beyond controversy.

Error is assigned upon allowance of an amendment of the complaint to allege that appellant and Charles T. Burnham were copartners and as such conducted the business in which decedent suffered his death. Just how the appellant was prejudiced by such ruling is not obvious, since his authority in conducting the business was not disputed, and he would be equally liable whether sued separately or jointly with another. But we cannot authoritatively decide the question of error in one order when the appeal is from a different one not dependent on the former. An appeal from an order does not bring up for review other orders made in the same

action. *Flanagan v. C. & N. W. R. Co.* 45 Wis. 98; *Breed v. Ketchum,* 51 Wis. 164, 7 N. W. 550; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 501, 83 N. W. 851.

By the Court.—Order appealed from is affirmed.

ASSOCIATED ARTISTS, Respondent, vs. CLEMENT and others, Appellants.

SAME, Appellant, vs. SAME, Respondents.

March 18—April 5, 1910.

Sales: Commissions: Evidence: Agency: Contracts: Performance: Interest.

1. A finding of the trial court that certain goods were sold by the defendants directly to the purchaser, and were not sold for defendants by plaintiff so as to entitle plaintiff to commissions under a trade agreement, is sustained by the evidence.
2. A finding that plaintiff is entitled to a certain sum as its reasonable charge, agreed to and approved by an authorized employee of defendants, for sketches prepared by plaintiff to be used by defendants and to remain the property of plaintiff, is sustained by the evidence.
3. Where a contract for certain work was performed by plaintiff prior to the time fixed therein except as to one item, and as to that the work, being unsatisfactory, was by agreement redone at plaintiff's expense some months later, the performance was not completed until the later date, and plaintiff is entitled to interest on the contract price from such later date only.

APPEALS from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Modified and affirmed.*

This is an action for an accounting concerning transactions between the parties from August 1, 1905, to January 1, 1907. Both parties appeal from the judgment. In the interim between the time when the transactions occurred and the bringing of the action one of the members of the defend-

ant partnership died, but his interest in the business is held by his representative. The plaintiff is a corporation whose place of business is located in Milwaukee, and is engaged in interior decorating and finishing and in furnishing draperies, curtains, and hangings for such work. The defendants do a similar business in Milwaukee and also sell rugs and household furniture. The parties had a trade agreement, by the terms of which each was allowed a trade discount of ten per cent. from the regular price at which work was done or materials furnished ordinarily to their customers, and a commission of ten per cent. of the amount paid by a customer to the party with whom he dealt, when such customer was procured by the other party. For some work and some materials no commission or discount was allowed, and when such were furnished they were to be charged as net. The trial court made findings and a statement of the account between the parties and awarded plaintiff judgment for $1,049.13 as the amount due it on account and $151.93 as costs and disbursements.

On the defendants' appeal exception is taken to an allowance of interest to the plaintiff by the trial court upon the so-called Thompson account. On August 4, 1905, the plaintiff agreed with the defendants, in writing, to furnish certain materials and to do certain painting and decorating for the interior of the house of one A. E. Thompson at Oshkosh, Wisconsin. The contract price was $950 and the work was to be finished by December 1, 1905. The work done under the contract was not entirely satisfactory to the Thompsons, and by mutual agreement of the plaintiff, the defendants, and Thompson the defendants undertook on July 18, 1906, to refinish part of the library in the Thompson residence at plaintiff's expense. This work was completed about August 1, 1906. The trial court allowed $78 as the cost of this refinishing. The court allowed plaintiff interest from December 1, 1905, to May 15, 1906, upon $950, the original

contract price. Defendants object to the allowance of this interest.

The defendants also object to the allowance of the sum of $210.50 which the trial court found was a reasonable charge for the making of four sketches for decorating and furnishing the house of one Arthur Robinson of Racine, Wisconsin. The sketches were prepared by the plaintiff under an agreement which it made with the defendants through an employee of the defendants. By the terms of this agreement the defendants were to pay for the cost of preparing the sketches and to have the use of them in negotiating with and doing the work for Robinson, but the plaintiff was to retain title to the sketches. There was evidence upon the trial that the sum claimed was a reasonable and fair price for preparing the sketches. The defendants claim that the employee who made the agreement was not authorized to do so; that under the general custom of the business the sketches would belong to them; that the plaintiff retains them and claims ownership; and that plaintiff is on this account not entitled to any allowance therefor.

The plaintiff appeals from the judgment of the trial court as to some of the items of the so-called MacDonald claim. On October 18, 1905, the plaintiff obtained a contract to paint and decorate the residence of Norman MacDonald at Calumet, Michigan. During the month of October, 1905, the plaintiff obtained from the defendants samples of draperies and hangings and the prices thereof. The samples were examined by the MacDonalds, and on January 29, 1906, the plaintiff furnished to the defendants a list of the goods wanted for the MacDonald residence. The articles were prepared by the defendants, and in April, 1906, when the MacDonalds came to Milwaukee, they were taken by a representative of the plaintiff to the place of business of the defendants. They examined the articles prepared for them, rejected a few of them, and ordered other goods. They agreed

to and afterwards did pay $1,472.50 to the defendants for these goods. Plaintiff claims that it sold the MacDonalds this bill of goods at an agreed price, and that the subsequent changes as to certain items did not make it a sale by the defendants. Plaintiff claims to be entitled to the difference between the price made by the defendants in October, 1905, for this bill of goods and the sum collected by the defendants from MacDonald therefor. The trial court allowed plaintiff a ten per cent. commission on this bill of goods and rejected the claim for $345.25, which was the difference between the sum paid by MacDonald and what the defendants agreed to charge plaintiff for this bill of goods.

Other objections which were made to the findings of the trial court and the judgment are not pressed or argued upon these appeals.

For the plaintiff there were briefs by *Olwell & Drought*, and oral argument by *L. A. Olwell*.

For the defendants the cause was submitted on the briefs of *O'Connor, Schmitz & Wild*.

SIEBECKER, J. On plaintiff's appeal it is contended that the court erred in not allowing it a credit of $345.25 on the MacDonald transaction. The evidence as to this item is not free from dispute. There is dispute in the evidence between the plaintiff's representative and the defendants as to whether this bill of goods was sold by the plaintiff to MacDonald before the MacDonalds visited defendants' store in April, or whether the sale was then consummated by the defendants at their store in Milwaukee. The trial court found that the bill of goods was sold by the defendants to the MacDonalds when they were in Milwaukee, and the following facts lead to this conclusion: They were not included in the plaintiff's agreement for decorating, though the plaintiff claims the goods were theretofore ordered by them for the MacDonald residence, and the defendants' books contain no

entry of a purchase of the goods by the plaintiff, but they are charged on the books to MacDonald after he visited the defendants' store in April, 1906. The items and prices were agreed upon by the defendants and the MacDonalds in April, 1906, and thereafter bills were presented by the defendants to MacDonald and paid to them by him. Plaintiff at no time obtained a statement for the goods from the defendants, and the plaintiff did not present any to MacDonald. The court's finding is furthermore supported by the direct evidence of the defendants, to the effect that they sold the goods to MacDonald; that the MacDonalds in fact negotiated with the defendants at their store; that they subsequently received a bill from the defendants, and, as purchasers from the defendants, made payment thereof; and that the MacDonalds wholly disregarded the plaintiff in the transaction after they were at the defendants' store. In the light of these facts and in view of the conduct of all of the parties respecting the transaction we cannot say that the court's finding is against the clear preponderance of the evidence. It must stand undisturbed.

Defendants' contention respecting the allowance of $210.50 for sketches and drawings prepared by the plaintiff at defendants' request for use in connection with the work on the Robinson residence is not sustained. The proof satisfactorily shows that the defendants' representative ordered these sketches and that they were accepted by them. There is evidence that the plaintiff presented the defendants with a bill for this work, with its charges therefor, and that they were approved by one Stocking, who had charge of this matter for the defendants. In addition to the evidence of such approval of the amount of these bills, there is evidence of witnesses to the effect that the amount allowed by the court was reasonable and proper. This evidence sufficiently supports this finding of the court, and we cannot reject the trial court's conclusion as to this item.

The defendants furthermore contend that the court erred in allowing plaintiff interest from December 1, 1905, on $950, the contract price for work done in the Thompson residence. The court found that in August, 1905, the plaintiff agreed with the defendants to do interior work in the Thompson residence at an agreed price of $950, and that "the plaintiff without delay performed said contract as it by its terms required prior to December 1, 1905, except as to the finishing of the woodwork in the library of said house, which was redone at plaintiff's cost." It appeared that the plaintiff agreed with the defendants on July 18, 1906, that the defendants should finish this library at plaintiff's expense, and that pursuant thereto they refinished it at a cost of $78, which was to be charged to the plaintiff as of July 18, 1906. From this it seems clear that the Thompson contract was not completed by December 1, 1905, but that it was in fact completed after July 18, 1906. This manifestly precluded plaintiff from recovering interest on the amount of this contract from December 1, 1905. We think that the defendants' claim that the plaintiff is entitled to interest on the balance due on the Thompson contract, to wit, $872, from the time of its completion, is correct, and that the interest thereon from December 1, 1905, to August 1, 1906, amounting to $38, with interest on it to the date of the judgment, amounting in all to $43.32, was erroneously allowed and should be deducted, and that the judgment should be so modified.

By the Court.—The judgment herein is modified by deducting the sum of $43.32 from the sum allowed as damages to the plaintiff, so that plaintiff shall have judgment for $1,157.74, and as so modified the judgment is affirmed, the defendants to recover one bill of costs and to be allowed to tax forty pages for the printing of their case.

CASE, Appellant, vs. BEYER and another, Respondents.

March 18—April 5, 1910.

(1, 5) *Appeal: Review: Undisputed facts: Findings by the court.* (2–4) *Bills and notes: Title: Verdict construed: Rights of purchaser: Contracts: One party preventing performance by the other.*

1. Undisputed facts are available in support of a judgment without a finding of the jury thereon.
2. The undisputed fact that title to the note in suit passed to plaintiff is not negatived by findings by the jury that he did not purchase the note prior to maturity in good faith and that when he procured it from the payee he had knowledge of an agreement between the payee and the makers.
3. Where one party to a contract, though ready and willing to carry it out, is prevented from so doing by default of the other party, the latter cannot take advantage of such failure of performance.
4. Where by agreement a note is to be returned to the makers unless a third person performs a certain contract, and the makers by their own default prevent such performance, the holder of the note may recover thereon even though he purchased it with knowledge of such agreement.
5. Findings which, under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), the trial court will be presumed to have made upon questions not submitted to the jury, are subject to review on appeal without exception, and will be set aside if against the clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

This action was brought by the plaintiff against the defendants to recover upon a promissory note executed by defendants, payable to the order of one Andrew D. Agnew, for $425. On the back of the note appears the following: "I hereby guarantee the collection of the within note. Andrew D. Agnew." "For Collection. *Spencer L. Case.*" The defendants answered severally, admitting the execution and delivery of the note, but denying that the plaintiff was the owner and holder thereof, and further alleging that if he

were such owner and holder he took the note with knowledge of a certain agreement between defendants and Agnew, the payee, that it was to be returned to defendants in case one Lucy Anson failed to consummate a certain contract between her and the defendants, which agreement made by Agnew is as follows:

"Milwaukee, July 25, 1906.

"For value received, I hereby agree that in the event of a certain contract, executed this day by and between *J. H. Beyer, Aug. F. Kinkel* and Lucy Anson, for the erection of a building on lot 3, block 2, in Maynard & Agnew's subdivision No. 3, in the city of West Allis, should not be consummated by the said Lucy Anson by the execution of a mortgage of $3,500 on said premises for the erection of said building, then and in that event I agree to return to the said *J. H. Beyer* and *August F. Kinkel* a certain promissory note payable to me for $425.00, dated this date, payable November 1, 1906. [Signed] A. D. AGNEW."

The contract made between Lucy Anson and defendants is as follows:

"Memorandum of agreement, entered into this 25th day of July, 1906, by and between *J. H. Beyer* and *August F. Kinkel,* parties of the first part, and Lucy Anson, party of the second part,

"Witnesseth, that whereas, the said Lucy Anson has heretofore paid to one William H. Buettner, who has given receipt therefor, in the name of the West Allis Investment Company, the sum of four hundred seventy-five dollars ($475), to apply as part purchase money on lot No. three (3) in block No. two (2), in Maynard's & Agnew's subdivision No. 3, in the city of West Allis, the purchase price of said lot to be fifteen hundred dollars ($1,500), the said parties of the first part agree to procure a conveyance of said lot from the National Land Company to said party of the second part, the balance of the purchase price of such lot to be paid as heretofore provided.

"And whereas, the said Lucy Anson is desirous of having erected on said lot a building to cost not to exceed thirty-five hundred dollars ($3,500).

"And whereas, the said parties of the first part hereto agree to secure a first mortgage loan on said premises of thirty-five hundred dollars ($3,500) with which to erect said building, they to receive a commission of one per cent. (1 %) for securing said loan; they also to have the privilege of erecting the said building, the work to be done at a price to be determined upon as follows: The parties of the first part shall have the right to select two reputable and responsible contractors, and the second party shall have the right to select two reputable and responsible contractors for the purpose of bidding on the work, the bids to be submitted by the parties so selected for that purpose within five days from the time the plans are prepared and submitted for the building contemplated by this agreement.

"The work shall be done by the parties of the first part at the price submitted by the lowest bidder, but in case dispute arises between the parties to this agreement as to the *bona fideness* of said lowest bid, then the same to be settled by arbitration in the following manner: The parties of the first part to select one arbitrator, and the party of the second part to select one arbitrator, and in the event that these two arbitrators cannot agree, then the two thus selected to select a third, and the matter to be determined by a majority of said arbitrators, and when so decided all parties to this agreement are bound by said arbitration. Mrs. Anson to secure plans and specifications for the same, with the privilege of her own architect as to supervising the job, the ordinary building contract to be drafted giving him such power as is usual under such contracts in the city of Milwaukee.

"It is further agreed by and between the parties hereto that upon the conveyance of said lot to said Lucy Anson, and the execution of a first mortgage of thirty-five hundred dollars ($3,500), as hereinbefore provided, the said Lucy Anson will thereupon pay to the National Land Company the further sum of twenty-five dollars ($25), and will thereupon execute to the said National Land Company, or its assigns, a second mortgage upon said premises to secure the payment of the balance of the aforesaid purchase price, namely, one thousand dollars ($1,000), payable on or before three (3) years after date, in monthly instalments of not less than thirty dollars ($30) each, payable on the first day of each

and every month, from and after November 1, 1906, with interest on all deferred payments at the rate of 6 per cent. (6 %) per annum, payable semi-annually.

"It is further agreed that the building is to be erected within ninety (90) days from the date of furnishing plans and specifications by Mrs. Anson. In case the parties of the first part do not secure a first mortgage loan at the rate of 4 per cent. (4 %) for thirty-five hundred dollars ($3,500), the party of the second part to have the option to secure her own mortgage loan.

"In witness whereof, said parties have hereunto set their hands and seals the day and year first above written.

[Signed] "J. H. BEYER. [Seal.]
"AUGUST KINKEL. [Seal.]
"LUCY ANSON. [Seal.]

"In presence of
"A. D. Agnew.
"John Toohey."

It further appears that the West Allis Investment Company, of which the defendants and one William Buettner were the officers, were also the agents for the sale of property belonging to the National Land Company, a corporation practically owned by A. D. Agnew; that Mrs. Anson had paid $475 to William Buettner, who receipted for it in the name of the West Allis Investment Company, upon the purchase of one of the National Land Company's lots; that the money was never paid to the National Land Company or to Agnew. The giving of the note seems to have arisen out of the transaction on the purchase of the lot by Mrs. Anson and the receipting for the money by Buettner.

Upon the issues raised the case was submitted to the jury, and the following verdict returned:

"(1) Did the plaintiff purchase the note in suit prior to its maturity from A. D. Agnew in good faith, paying therefor $425? *A.* No.

"(2) Did the plaintiff have knowledge, when he procured the note from A. D. Agnew, of the agreement, Exhibit 2, between Agnew and the defendants? *A.* Yes.

"(3) Was the failure of Mrs. Lucy Anson to execute a mortgage of $3,500 for the erection of a building caused by the default of the defendants? *A.* Yes.

"(4) At what sum do you assess the plaintiff's damages? *A.* $489.17."

The plaintiff excepted to certain portions of the charge of the court to the jury. Both parties moved the court for judgment on the verdict. The plaintiff's motion was denied and the defendants' motion granted. Plaintiff excepted to the first question in the special verdict and the answer of the jury thereto, and further excepted to the order of the court denying his motion for judgment on the verdict and granting defendants' motion for judgment dismissing the complaint. Judgment was rendered in favor of the defendants dismissing the plaintiff's complaint, from which judgment this appeal was taken.

For the appellant there was a brief by *McElroy, Ferguson & Lamfrom,* and oral argument by *H. T. Ferguson.*

William Kaumheimer, for the respondents.

KERWIN, J. The question arises in this court whether upon the findings of the jury and the undisputed evidence the plaintiff was entitled to judgment below. No finding of the jury is necessary upon undisputed facts. It is only material controverted facts which need be submitted to the jury. *Kerkhof v. Atlas P. Co.* 68 Wis. 674, 32 N. W. 766; *Howard v. Beldenville L. Co.* 129 Wis. 98, 111, 108 N. W. 48; *Hutchinson v. C. & N. W. R. Co.* 41 Wis. 541, 553; *Ault v. Wheeler & W. Mfg. Co.* 54 Wis. 300, 11 N. W. 545; *Berg v. C., M. & St. P. R. Co.* 50 Wis. 419, 7 N. W. 347. The fact that the title to the note sued upon passed to the plaintiff is without substantial dispute. He was therefore the owner at the time of the commencement of this action, unless the findings of the jury negative such ownership. The only finding which can be claimed in any way to affect this

question is the first, which finds that the plaintiff did not purchase the note prior to its maturity in good faith paying therefor $425. This finding does not negative the title of the plaintiff to the note, but only the *bona fides* of his purchase. This is clear from the other findings as well as the evidence. All the evidence is to the effect that the plaintiff bought the note, but the controversy on the trial was whether he bought it in good faith and paid for it without knowledge of the equities between defendants and the payee, Agnew. The jury found in answer to the second question that when plaintiff procured the note from Agnew he had knowledge of the agreement between Agnew and the defendants. So the question of the plaintiff's title to the note was not negatived by the verdict and was established by the evidence.

The third question is the one upon which the principal controversy arises. By their answer to this question the jury found that the failure of Lucy Anson to execute the mortgage mentioned in the agreement set out in the statement of facts was caused by the default of the defendants. This finding is well supported by the evidence. It is urged on the part of the plaintiff that the defendants cannot take advantage of the default caused by themselves, while on the part of the defendants it is insisted that they are entitled to stand upon the letter of the contract, and, the contract not having been carried out by Lucy Anson, they are entitled to a return of the note, and the plaintiff, being a purchaser with notice, cannot recover. The evidence shows that Lucy Anson was always ready and willing to carry out the contract on her part. The contract contemplated good faith on the part of both parties to it and performance by both parties. Until the defendants tendered performance on their part Lucy Anson could not perform, and, the failure of performance or consummation on her part being caused by the default of the defendants, they cannot profit by such default. This doctrine is well supported by authorities. *Maher v. Davis & S. L. Co.* 86

Wis. 530, 57 N. W. 357; *Danley v. Williams,* 16 Wis. 581; *Kellogg v. Nelson,* 5 Wis. 125; *Hoffman v. King,* 70 Wis. 372, 36 N. W. 25; *Williston v. Perkins,* 51 Cal. 554; *Read v. Davis,* 35 Me. 379; *Williams v. Bank,* 27 U. S. 96; *Attix, N. & Co. v. Pelan & Anderson,* 5 Iowa, 336; *Angelloz v. Rivollet,* 2 La. Ann. 652. The doctrine is well stated in *Jones v. Walker,* 13 B. Mon. 163, at page 165, as follows:

"He who himself prevents the happening or performance of a condition precedent, upon which his liability, by the terms of the contract, is made to depend, cannot avail himself of his own wrong and relieve himself from his responsibility to the obligee, and shall not avail himself, to avoid his liability, of a nonperformance of such precedent condition, which he has himself occasioned, against the consent of the obligee."

The finding of the jury upon the third question of the special verdict, in connection with the evidence, establishes conclusively that the default of the defendants, without any fault on the part of Lucy Anson, occasioned the failure of performance of the agreement between defendants and Lucy Anson. Therefore the defendants have no defense to the note in the hands of the plaintiff, notwithstanding his full knowledge of the equities existing between Agnew and the defendants.

It is argued by defendants' counsel that it must be held that the court below in awarding judgment on the verdict for defendants found, under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), that plaintiff was not the owner of the note. If the court did so find, the finding was practically against the undisputed evidence and cannot be sustained. This is not a contest between a creditor and an assignee of property alleged to have been fraudulently transferred. The simple question is whether, on the evidence, the title to the note passed from Agnew, the payee, to the plaintiff, and it seems clear that it did. If the court found as claimed by defendants the finding is subject to review here without exception.

Farrell v. Phillips, 140 Wis. 611, 123 N. W. 117. Under the foregoing late decision of this court, if such finding is against the clear preponderance of the evidence it may be set aside. We are therefore of the opinion that upon the findings of the jury and the evidence the plaintiff was entitled to judgment and that his motion should have been granted, and that the court erred in granting the defendants' motion and awarding judgment dismissing the plaintiff's complaint.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to enter judgment for the plaintiff.

COLLAT, Appellant, vs. GOTTSCHALK and others, Respondents.

March 19—April 5, 1910.

Contracts: Performance: Pleading: Recitals creating obligations: Conditions precedent.

1. In a complaint a general averment of performance of a contract on the part of the plaintiff is overcome by detailed and specific facts therein stated which show a failure of performance.
2. Recitals in a contract in the form of a preamble may create express obligations between the parties if they contain words of binding import.
3. Where a party to a contract agreed that he would exchange with a corporation, not a party to the contract, certain shares of stock in other corporations named, not parties to the contract, for 73,750 shares of the stock of the corporation first mentioned, and that said shares so received by him should be held in trust by a designated third person, performance on his part is not shown by an averment that he received only 63,750 shares in exchange and failed to deposit any of these in trust because the other parties to the contract, though having the power so to do, failed and refused to procure for him the remaining 10,000 shares, there being no express agreement by such other parties to procure such shares for him.

4. Covenants prior with reference to time of performance, going to the consideration of the contract, and of such nature that breach thereof cannot be adequately compensated in damages, will (nothing else appearing to the contrary) be so construed as to require performance thereof before the duty of performance arises on the part of the other party to the contract.
5. A covenant that shares of stock shall be placed in trust with a third person who shall have power to vote the same, in consideration of which the other party to the contract agrees to sell other shares of the same corporation to the public for the account of the party so required to put his shares in trust, is such a covenant as is described in paragraph 4.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Churchill, Bennett & Churchill,* and oral argument by *W. H. Churchill.*

For the respondent *Mary S. Fish,* executrix, there was a brief by *Irving A. Fish* and *W. W. Storms;* for the respondents *Gottschalk* and others there was a brief by *Glicksman, Gold & Corrigan;* and the cause was argued orally by *Nathan Glicksman.*

TIMLIN, J. The action is upon the following agreement:

"Memorandum of agreement made and entered into this 20th day of March, 1903, by and between *Theodore Collat,* of Grand Rapids, Michigan, party of the first part, and *S. W. Gottschalk, G. H. Gottschalk,* F. M. Fish, and *John K. Fish,* all of Milwaukee, Wisconsin, parties of the second part:

"Witnesseth, that whereas the party of the first part is owner of ten thousand (10,000) shares of preferred stock in the Advance Oil Company of Augusta, Maine, and twenty-five thousand (25,000) shares of common stock of said company, and does also own fifteen thousand (15,000) shares in the Crown Oil Company of Augusta, Maine, and does also own ten thousand (10,000) shares in the Alma Gold Mining Company;

"And whereas, it is deemed desirable to sell the holding of said companies to the Advance Mineral Company;

"And whereas, said party of the first part has and by these

presents does agree to accept in lieu of the stock so held by him as above seventy-three thousand seven hundred and fifty shares of the capital stock of said Advance Mineral Company;

"And whereas, said party of the first part further agrees that said stock in the Advance Mineral Company so received in exchange, except twenty-three thousand seven hundred and fifty shares thereof, shall be held by W. M. Gottschalk as trustee, to be held and voted by him until such time as a majority of the directors of the Advance Mineral Company shall resolve that the stock so held shall be released from such trusteeship;

"And whereas, there is to be formed the Badger Investment Company, the purpose of which company is to purchase stock in the Advance Mineral Company at the ratio of sixty-eight thousand (68,000) shares of stock for each twenty-five (25) shares subscribed to the capital stock of said company:

"Now, therefore, in consideration of such an agreement, parties of the second part do hereby agree to subscribe for fifty shares of the capital stock of the Badger Investment Company for the use and benefit of the party of the first part, which said stock so subscribed for will represent one hundred and thirty-six thousand (136,000) shares of the capital stock of said Advance Mineral Company; the parties of the second part do hereby agree and bind themselves that such purchase by them shall in no way create any liability on the part of the party of the first part; and the party of the first part does further agree that the said stock shall be held by the Badger Investment Company and shall be sold by them at such times and such prices as the board of directors of said company shall determine.

"And in consideration of such agreements and one dollar to us in hand paid, the receipt whereof is hereby acknowledged, the parties of the second part hereby guarantee that the party of the first part shall receive from the sale of such stock the sum of five thousand dollars ($5,000) and interest at the rate of five per cent. per annum from August 27, 1902, within two years from the date hereof. That is to say, the first party is guaranteed such sum whether any of said stock is sold or not.

"It is further agreed by and between the parties hereto that after said party of the first part shall have received said sum of five thousand dollars and interest, then so much of said Advance Mineral Company's stock as remains unsold shall be sold for the joint account of the parties to this contract, viz., one half of the proceeds to go to the party of the first part and one half to the parties of the second part.

"It is further agreed by and between the parties hereto that in case the Advance Mineral Company does not acquire the properties above named, this agreement shall be null and void and of no effect.

"It is further understood that in consideration of the mutual agreements herein contained, first party is to be held harmless by the second party upon an alleged purchase of an additional ten thousand (10,000) shares of preferred stock of the Advance Oil Company; that is to say, said stock is to be returned and second parties guarantee that first party shall not be called upon to pay for the same.

"In witness whereof the parties have hereunto set their hands and seals the date first above mentioned.

"THEODORE COLLAT. [Seal.]
"S. W. GOTTSCHALK. [Seal.]
"G. H. GOTTSCHALK. [Seal.]
"F. M. FISH. [Seal.]
"JOHN K. FISH. [Seal.]

"I do hereby certify that fifty (50) shares of the capital stock of the Badger Investment Company have been subscribed for in the name of *S. W. Gottschalk* and F. M. Fish, which said fifty shares represent the ownership of one hundred and thirty-six thousand (136,000) shares of the capital stock of the Advance Mineral Company, and I do further certify that said subscription is for the use and benefit of *Theodore Collat,* of Grand Rapids, Michigan, in accordance with an agreement signed by *Theodore Collat,* as party of the first part, and *S. W. Gottschalk,* F. M. Fish, *G. H. Gottschalk,* and *John K. Fish,* parties of the second part, which agreement is dated the 20th day of March, 1903, and said subscription is subject to the terms and conditions set forth therein.

"Dated Milwaukee, Wisconsin, March 20, 1903.

"F. M. FISH.
"S. W. GOTTSCHALK."

The breach averred is that more than two years have elapsed since the date of said agreement, and that demand has been made for the sum of $5,000 and interest, but the same has not been paid nor has any part thereof. Performance on the part of the plaintiff is averred as follows:

"The plaintiff duly surrendered all of the said stock held by him in said various companies in said agreement mentioned, all in accordance with the terms of said contract on his part to be kept and performed, and that the plaintiff has duly and prior to the commencement of this action performed all the terms and conditions of said agreement on his part to be kept and performed; and, in addition thereto, the plaintiff at all the times herein mentioned was, and still is, ready and willing to permit his stock in said Advance Mineral Company so received and exchanged for said other stock, except 23,750 shares thereof, to be held by W. M. Gottschalk, mentioned in said agreement, as trustee, to be held and voted by him until such time as a majority of the directors of said Advance Mineral Company shall resolve that the stock so held should be released from such trusteeship, and that the plaintiff duly and frequently, subsequent to the execution of said contract and prior to the commencement of this action, demanded of the defendants that they cause to be issued to him the 73,750 shares of the capital stock of said Advance Mineral Company to which he was and is entitled to receive in lieu of the stock held by him in said Advance Oil Company of Augusta, Maine, Crown Oil Company of Augusta, Maine, and Alma Gold Mining Company, and by him surrendered as aforesaid pursuant to the terms of said agreement, in order to enable the plaintiff to deliver 50,000 shares of said stock to said W. M. Gottschalk as trustee, to be held and voted by him until such time as a majority of the directors of said Advance Mineral Company should resolve that the stock so held should be released from such trusteeship; that the plaintiff frequently, subsequently to the execution of said contract and prior to the commencement of this action, duly offered to make delivery to the said W. M. Gottschalk as trustee for the purpose aforesaid of all of plaintiff's stock in said Advance Mineral Company, which in and by the terms of said contract he agreed should be held by said W. M. Gottschalk as trustee for the purpose

aforesaid, as soon as the said shares were delivered to the plaintiff, and that he frequently duly demanded said stock of the defendants to enable him so to do, and that at all of the times subsequent to the execution of said contract and prior to the time of the commencement of this action it was within the power and was the duty of the defendants to cause said 73,750 shares of the capital stock of said Advance Mineral Company to issue to the plaintiff, but that the said defendants have ever since the making of said contract neglected and refused to cause to be issued to the plaintiff said 73,750 shares or any part thereof of the stock of said Advance Mineral Company to which the plaintiff was and is entitled, except 63,750 shares, and that the defendants did not nor did said Advance Mineral Company or any one for or on behalf of said parties, or either of them, deliver, transfer, or issue or cause to be delivered, transferred, or issued, to the plaintiff or to any one for him, or on his behalf, any other or greater number of shares of the capital stock of said Advance Mineral Company than 63,750 shares thereof, and that plaintiff never received more than 63,750 shares of the capital stock of said Advance Mineral Company."

We construe the foregoing to mean that the plaintiff failed to deposit any shares of stock in trust with W. M. Gottschalk, and that he seeks to excuse his failure in that behalf by the fact that he had received only 63,750 shares of the capital stock of the Advance Mineral Company, and that the defendants neglected and refused after demand upon them to cause to be issued to the plaintiff the other 10,000 shares. This was within defendants' power. It is also averred that it was the duty of the defendants so to do; and, no other source of duty than the contract being before the court, this must be presumed to mean that it was defendants' duty under the contract. That is a question of law. *State ex rel. Leiser v. Koch,* 138 Wis. 27, 119 N. W. 839. The defendants demurred orally to this complaint, the demurrer was sustained, and the plaintiff appealed.

Assuming that the Advance Mineral Company and the Badger Investment Company were Wisconsin corporations

authorized to purchase stock in other corporations, and assuming that the contract did not cover a scheme to defraud the public by the sale of mining stock spurious under sec. 1753, Stats. (1898), because the contract is not challenged in these respects, and because it does not appear what was either the real value or par value of the stock in the Advance Mineral Company or what was the par value of the stock of the Badger Investment Company, we proceed to the consideration of the questions argued.

The paragraphs of the contract beginning with the words "and whereas" are not mere recitals, but create express obligations between the parties to the contract, in those instances where such paragraphs contain words of express agreement. There is such an express agreement on the part of the plaintiff to accept in lieu of the stock held by him in three other corporations 73,750 shares of the capital stock of the Advance Mineral Company, but there is no express agreement on the part of the defendants to procure for delivery to the plaintiff these or any other shares of the capital stock of the Advance Mineral Company. This paragraph assumes the consent of the corporation named, and that all that is required is an agreement on the part of the plaintiff to accept an outstanding and continuing offer of that corporation. In the next paragraph the plaintiff expressly agrees that said stock in the Advance Mineral Company so received by him in exchange for his other shares, except a stated part thereof, shall be held by W. M. Gottschalk as trustee, and the purpose of this trust is shown in the power of the trustee to vote that stock until the trusteeship is released by the directors of the Advance Mineral Company. Performance of this paragraph on the part of the plaintiff would be shown had he not withheld from the trustee the stock actually received by him less 23,750 shares, but deposited this with the trustee and averred that he was unable to procure more from the Advance Mineral Company because prevented by the defend-

ants; but performance is not shown by the averment that, holding 63,750 shares of the stock of the Advance Mineral Company received in exchange, he refuses to deposit any of it in trust because there is rightfully due to him 10,000 other shares which defendants had the power to procure for him, but did not. As heretofore stated, there is no express agreement on the part of defendants that they will procure for the plaintiff the stock of the Advance Mineral Company, and if any such agreement on the part of defendants can be implied from the recitals of this contract it is manifestly not a covenant precedent to the plaintiff's express agreement to deposit the stock received by him in exchange in trust. Why plaintiff surrendered up his shares in the three foreign corporations without receiving the 73,750 shares stipulated for is not apparent, but it is apparent that he did so and received part payment. Why the 10,000 shares in arrears should come out of the shares to be deposited in trust, rather than out of the shares to be retained by plaintiff, is not shown. He then halts in his performance, and refuses to take the next step or proceed further until the defendants, because they have the power to do so, although they have not agreed to do so, procure for him the remaining 10,000 shares. He is in default. Now, whether this is default in the performance of a covenant which must be taken advantage of by the defendants in a counterclaim for damages, or whether the performance of this covenant on the part of the plaintiff is a prerequisite to defendants' performance of the covenant to pay from the sale of stock of the Advance Mineral Company the sum of $5,000, is the question to be determined. This obligation on the part of defendants is expressly made in consideration of such agreement and of $1. The agreement here mentioned must be (1) on the part of the plaintiff to accept in lieu of the shares held by him in the foreign corporations 73,750 shares of the capital stock of the Advance Mineral Company; (2) that said stock so received in exchange except

a certain specified amount should be held by W. M. Gottschalk as trustee under the trust terms specified; and (3) sale by defendants of shares of the capital stock of the Advance Mineral Company and payment over of the proceeds of such sale with a fixed amount guaranteed. Performance, therefore, on the part of the plaintiff of his agreement must antedate performance on the part of defendants. The time for the plaintiff to deposit his shares in trust must arrive before the time for defendants to pay the sum of $5,000 arrives. This is some indication that performance on the part of defendants depends on the prior performance by the plaintiff. *Grant v. Johnson,* 5 N. Y. 247; *Bean v. Atwater,* 4 Conn. 3; *Rider v. Pond,* 18 Barb. 179. The promise of the defendants being expressly based upon and in consideration of the agreement by the plaintiff, this is a still further indication in the same direction. *Kaukauna E. L. Co. v. Kaukauna,* 114 Wis. 327, 339, 89 N. W. 542.

Approaching now the substantial nature of the several promises, the ability to sell stock of the Advance Mineral Company from the sale of which this $5,000 should be realized and to obtain a suitable price per share might be materially affected by the voting control of the stock. The default of the plaintiff tended to diminish the voting control by the amount of at least 40,000 shares. The parties evidently regarded such voting control as desirable, because the plaintiff was to part with the right to vote his shares in the Advance Mineral Company and confer that right upon the trustee, and he was to do this before the defendants were required to attempt the sale of stock of the Advance Mineral Company for the account of the plaintiff. The substantial nature of the obligation therefore agrees with the form and terms of the contract. It is part of the consideration of the contract, and the act to be performed by plaintiff is to precede in time of performance the performance of the defendants. *Kellogg v. Nelson,* 5 Wis. 125, and cases cited in

note 3, p. 630, Id.; *Warren v. Bean,* 6 Wis. 120. If we regard the act of depositing the stock in trust as merely convenient, useful, or beneficial to the defendants in enabling them to make sales, yet the loss and inconvenience arising from breach of this agreement on the part of plaintiff could not well be estimated or compensated in damages, and the defendants might refuse to attempt to make any sales, as under this complaint we must presume they did because of the failure of plaintiff to perform in this respect. *Kaukauna E. L. Co. v. Kaukauna,* 114 Wis. 327, 339, 89 N. W. 542. If the defendants, on the other hand, have in fact gone on and made sales waiving prior performance on the part of the plaintiff, that constitutes a different cause of action in behalf of the plaintiff and one that is not averred in the complaint before the court. From the form of these stipulations, their relations to one another, and the nature of the stipulation on the part of plaintiff, we are constrained to the opinion that this default in depositing the stock in trust entitled the defendants to refuse to proceed further or to attempt to make or make any sales of the stock to the public, and hence that liability on their guaranty of a fixed amount of sales never arose, and that the judgment of the court below must be affirmed.

By the Court.—The judgment of the circuit court is affirmed.

PFEIFFER, Respondent, vs. RADKE, Appellant.

March 19—April 5, 1910.

Pleading: Unverified amendments: Harmless error: Negligence: Personal injury: Contributory negligence: Burden of proof: Automobiles: Frightening horses.

1. Harmless error in allowing unverified amendments to a verified complaint will be disregarded under sec. 3072*m*, Stats. (Laws of 1909, ch. 192).
2. In an action for personal injuries caused by defendant's negligence plaintiff need not, in order to make a *prima facie* case,

show affirmatively that he himself was free from contributory negligence. *O'Malley v. Dorn*, 7 Wis. 236; *Chamberlain v. M. & M. R. Co.* 7 Wis. 425; and *Dressler v. Davis*, 7 Wis. 527, so far as they hold to the contrary, overruled.

3. Evidence tending to show that upon a traveled track twenty-two feet wide with a ditch on each side plaintiff had driven his single horse as far to the right as he could, and had stopped, as defendant approached in his automobile; that defendant could have kept wholly to the right of the center of the road, but instead of doing so turned his machine to the left and passed so close to plaintiff's buggy that there was but from one to two feet between the wheel track of the buggy and that of the car; that water and slush were splashed toward the horse as the car passed; and that the horse, though ordinarily not afraid of automobiles, suddenly lurched and overturned the buggy, is *held* sufficient to sustain a verdict to the effect that defendant was negligent and that his negligence proximately caused the injury.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action for damages to person and property. The plaintiff was proceeding northward on a highway in Ozaukee county, driving a single horse that was old, well broken, and not afraid of automobiles. He observed the defendant approaching him with an automobile and coming in a southerly direction. The highway was turnpiked at this point, and the traveled portion of it was twenty-one or twenty-two feet in width, with somewhat deep ditches on either side. The plaintiff pulled his horse to the right side of the highway, approaching thereto as closely as he could without actually getting into the ditch, and stopped. The defendant was driving at a rate estimated at from ten to fifteen miles an hour when he passed the plaintiff. There was considerable water and slush on the highway. It does not appear that there was any actual collision between the two vehicles, but the testimony shows that the east wheel track of the automobile was from one to two feet from the west wheel of the buggy when the automobile passed. There was also evidence tending to show that the wheels of the automobile were splashing considerable mud and water on either side thereof. As the defend-

ant passed the plaintiff, the horse of the latter suddenly lurched and overturned the buggy, injuring the plaintiff and his wife, who was riding with him, and also damaging the buggy. This action is brought to recover damages for such injuries.

The jury found (1) that the plaintiff was injured as a result of his horse becoming frightened by the automobile; (2) that at the time of the accident the automobile of the defendant was not to the right of the middle of the traveled part of the highway; (3) that the highway was in such condition that the defendant in the exercise of ordinary care might have driven his automobile to the right of the middle of the highway; (4) that the injury would have been avoided had the defendant done so; (5) that the defendant was not in the exercise of ordinary care when the plaintiff was injured; (6) that such want of ordinary care was the proximate cause of the injury and damage to plaintiff; (7) that the plaintiff was not guilty of any want of ordinary care; (8) that plaintiff was damaged in the sum of $600.

From judgment entered on this verdict the defendant appeals and assigns the following errors: (1) Permitting the plaintiff to file a second amended complaint; (2) admitting certain testimony; (3) refusing to nonsuit the plaintiff; (4) refusing to grant a new trial.

H. L. Eaton, for the appellant.

For the respondent there was a brief by *James D. Shaw* and *Wm. F. Shanen,* and oral argument by *Clarke M. Rosecrantz.*

BARNES, J. The original and first amended complaints were verified. It is urged that under the provisions of sec. 2665, Stats. (1898), it was error to allow a second amendment to the complaint, because it was not verified. If it be conceded, as seems to be intimated in *Orton v. Scofield,* 61 Wis. 382, 21 N. W. 261, that error was committed, it was

harmless and must be disregarded in this court, under ch. 192, Laws of 1909 (sec. 3072*m*, Stats.).

The substantial accuracy of the photograph of the highway at and near the place of the accident was sufficiently established so that it was admissible for the purpose for which it was offered. There was no evidence in the case tending to show that the plaintiff was guilty of contributory negligence. In fact, as we view it, the evidence established the contrary. The cases of *O'Malley v. Dorn,* 7 Wis. 236; *Chamberlain v. M. & M. R. Co.* 7 Wis. 425; and *Dressler v. Davis,* 7 Wis. 527, in so far as they hold that a plaintiff in an action for injury to the person must not only show negligence on the part of the defendant, but that, before he makes a *prima facie* case, he must also affirmatively establish by competent evidence that he was free from contributory negligence, have not been subsequently followed in this court, and must to the extent indicated be considered as overruled. *Milwaukee & C. R. Co. v. Hunter,* 11 Wis. 160; *Achtenhagen v. Watertown,* 18 Wis. 331; *Randall v. N. W. Tel. Co.* 54 Wis. 140, 11 N. W. 419; *Hoth v. Peters,* 55 Wis. 405, 13 N. W. 219; *Welsh v. Argyle,* 85 Wis. 307, 311, 55 N. W. 412; *Whitty v. Oshkosh,* 106 Wis. 87, 91, 81 N. W. 992. No claim is made that the evidence offered on behalf of the plaintiff had any tendency to show that he did not exercise ordinary care.

The substantial questions in the case are: (1) Was the evidence sufficient to warrant the jury in finding that the defendant did not exercise ordinary care in the management of his automobile? (2) Was the jury warranted in finding that want of such care, if it existed, was the proximate cause of the injury?

The horse was old and well broken and not ordinarily afraid of automobiles. No warning or signal was given to the driver of the car to apprise him of the fact that the horse was liable to become affrighted. It appears from the evidence that the automobile was proceeding at a moderate rate

of speed and that there was no collision between the two vehicles. On this evidence the jury might well have acquitted the defendant of blame for the accident, because he had the same right to use the highway that the plaintiff had. On the other hand, there was evidence tending to show that the traveled portion of the highway was twenty-two feet in width at the point where the plaintiff was injured; that there were ditches on either side of the road; that the plaintiff had driven to the right as far as he could without going into the ditch on the east side; that the defendant as he approached the plaintiff turned his machine from the right side of the road to the left; that he passed so closely to the buggy that there was but from one to two feet between the west wheel track of the buggy and the east wheel track of the car; that it had been raining, and the wheels of the automobile were splashing considerable water and slush from the wheel ruts in the road; and that there was nothing to prevent defendant from keeping entirely to the right side of the center of the road. In view of such evidence the jury might have concluded that, by turning the car to the left toward the horse and running so closely to the buggy that a collision was very narrowly averted, the wheels of the car at the same time splashing water toward if not on the horse, the latter became frightened when it would not have become so had the car been driven nearer to the west side of the road, and that the defendant was negligent in veering his car to the left and driving it as closely as he did to the horse and buggy. This court cannot say that such inferences might not properly have been drawn by the jury from the evidence, and we conclude that the findings of negligence and proximate cause should stand. It would seem reasonable enough that if the car was to the west side of the road until it approached the horse, and was then turned toward it, such action was calculated to scare the animal and make it more liable to become frightened than if the car had continued in a straight course.

By the Court.—Judgment affirmed.

BUKOWSKI, Administrator, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

March 19—April 5, 1910.

Street railways: Killing of passenger: Negligence of motorman: Direction of verdict.

1. A person who left a street car and then returned and boarded it again after it had started, for the purpose of getting a shovel which he had negligently left behind, but without informing any one of that purpose, had no right, even if he was still to be considered a passenger, to demand that the car stop before it reached the next stopping place.
2. Negligence of the motorman is not shown by the fact that he increased the speed of the car to about six miles per hour while such a person was standing in a place apparently free from danger, on the front platform or vestibule, holding on to the railing of the door, and reaching into the car for his shovel, although in some way, when the speed of the car was increased, the person fell from the platform and was killed.
3. Great diligence is required of a motorman in the performance of his duties, but the very nature of his duties prevents him from keeping a close watch in the rear.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an action to recover damages for the death of one Joseph Miscewski (plaintiff's decedent), caused, as is alleged, by the negligence of defendant's employees. A verdict for the defendant was directed by the trial court and the plaintiff appeals.

The facts, stated most favorably to the appellant, are as follows: Miscewski, the deceased, was a Polish laboring man, fifty-two years of age, and of average intelligence. At about 6 o'clock p. m. October 26, 1907, he was a passenger on one of defendant's street cars in Milwaukee, carrying with him his shovel, and he alighted from the car as it reached the end of the line, and started toward his home. After going 100 feet or more he recollected that he had forgotten his shovel

and he started back towards the car. Meantime the trolley had been reversed and the car had started on its return trip. Miscewski jumped on the rear platform of the moving car after it had gone two or three car lengths, walked rapidly past the conductor, through the car, shouted "Stop, I want my shovel!" in Polish, stood in the front vestibule with his back to the motorman, holding on to the railing on the front door of the car with his left hand and reaching around into the car with his right hand for his shovel, which was lying on a seat, when the motorman applied more electricity, increasing the speed of the car to about six miles an hour, and in some manner Miscewski fell off from the platform, striking the pavement with his head, and receiving injuries from which he died. His shovel was not removed from the car.

Harry M. Silber, for the appellant.

Clarke M. Rosecrantz, for the respondent.

WINSLOW, C. J. We think the verdict was properly directed. No negligence on the part of the motorman was proven. It is very hard to see how the deceased can be considered as a passenger, when he returned to the car and boarded it without informing any one of his purpose; but, even conceding that he should properly be considered as a passenger, he certainly had no greater rights than those of a passenger. His shovel had been left in the car by reason of his own negligence. In boarding the car to regain it he could at the most demand nothing except that, when the car reached its next regular stopping place, viz., at the end of the block, he be let off. He had no right to demand that it stop at once. The negligence alleged is that the motorman put on more power and jerked the car, thus throwing him off. Had the deceased been in a dangerous position, to the motorman's knowledge, when the latter turned on the power, there might be ground for the claim; but the evidence is conclusive that when the power was turned on the deceased was

standing apparently in a perfectly safe place, to wit, on the front platform or vestibule, holding onto the railing of the door and reaching into the body of the car. There could be no reasonable inference that any injury would happen to a person in such a position merely by reason of an ordinary increase in the speed of the car.

Great diligence is rightly required of a motorman in the performance of his duties; but the very nature of his duties necessarily prevents him from keeping anything like a close watch in his rear. In fact, he must, when his car is moving, keep a close and practically unremitting lookout ahead, so that he may be able to control his car immediately upon the appearance of danger to any one. In these days of rapid transit, crowded streets, and electrically driven cars of great weight, no other rule can be tolerated. Even if the motorman knew that Miscewski was on the car for the purpose of getting his shovel, the inference is just as reasonable as any other that he (the motorman) increased the speed of the car for the purpose of more quickly reaching the proper stopping place at the end of the block, where Miscewski might get off. In this act there could be no negligence, so long as Miscewski was standing in a place apparently entirely free from danger.

By the Court.—Judgment affirmed.

BARRON COUNTY, Respondent, vs. BECKWITH, Appellant.

February 2—April 26, 1910.

Clerks of circuit courts: Salary system: Fees in naturalization proceedings belong to county.

1. Where, pursuant to ch. 411, Laws of 1901, a county board has fixed the salary of the clerk of the circuit court, he must account for and pay over all fees and other emoluments received by him in his official capacity.
2. The services performed by clerks of the circuit courts in proceedings to naturalize aliens under the federal statutes are per-

formed in their official capacity as such clerks, and the fees, whether fixed by act of Congress or by state law, are fees or emoluments of the office received by the clerks in their official capacity.

3. The fact that the clerks' fees in naturalization proceedings now prescribed by act of Congress differ from the fees which were fixed by the state law at the time of the enactment of ch. 411, Laws of 1901, is immaterial.

4. The act of Congress, authorizing and permitting the clerks to "retain one half of the fees" collected in naturalization proceedings, refers merely to the adjustment between such clerks and the Bureau of Immigration, and does not permit clerks who are on a salary basis to hold such fees as against the county.

APPEAL from a judgment of the circuit court for Barron county: A. J. VINJE, Circuit Judge. *Affirmed.*

This is an appeal by the defendant from a judgment against him for the sum of $165.50. The question involved is the right of the clerks of the circuit courts of this state, who, pursuant to the state statute, have been placed upon a salary basis of compensation, to retain fees allowed to them by the federal statutes for services in naturalization proceedings. It is alleged in the complaint that the defendant was clerk of the circuit court for *Barron* county; that the county board of said county, pursuant to ch. 411, Laws of 1901, which provides for a change from the fee to the salary system, adopted in 1901 the following resolution:

"WHEREAS, ch. 411, Laws of 1901, provides for a change from fees to salary system of officers therein named, therefore be it

"*Resolved,* in accordance therewith, that the method of compensating the clerk of circuit court for his services shall be a salary fixed by the county board, which shall be in lieu of all fees, *per diem,* and compensation for services rendered by him or his deputy, and that all such fees, *per diem,* and compensation for services rendered shall be turned over to the county treasurer according to law."

It is further alleged in the complaint that between January 1, 1907, and January 1, 1909, the defendant as clerk

collected as fees under the naturalization laws of the United States the sum of $165.50, which sum has been retained by him, and which he has failed to turn over to the treasurer of said county. The defendant answered admitting certain allegations of the complaint, and alleged that the fees received by him under the naturalization laws of the United States were not included in such fees as he was required to account for and turn over to the treasurer of the county under the resolution referred to, and denied any indebtedness to the county. The case was tried by the court. The court held that the defendant was liable to the county for the fees, and rendered judgment accordingly. From this judgment the defendant appealed.

For the appellant there was a brief by *Olin & Butler,* and oral argument by *H. L. Butler.*

For the respondent the cause was submitted on the brief of *J. W. Soderberg.*

The following opinion was filed February 22, 1910:

KERWIN, J. The defendant was clerk of the circuit court for *Barron* county upon a salary basis under the provisions of ch. 411, Laws of 1901, and a resolution of the county board passed in pursuance thereto by which he was to receive for his services as such clerk a fixed salary in lieu of all fees, *per diem,* and compensation for services rendered by him or his deputy. The resolution provided that all such fees, *per diem,* and compensation for services rendered should be turned over to the county treasurer according to law. The amount in dispute was collected by the defendant as fees under the naturalization laws of the United States and which he claims the right to retain. The manifest purpose of the legislature as indicated in ch. 411, Laws of 1901, was to make the salary fixed full compensation to the clerk for all services performed by him as such clerk, and it therefore provided that he should pay to the county treasurer "all fees,

per diem, and other emoluments of whatever kind received by him," and that the salary of clerks and deputies should be in "lieu of all fees, *per diem,* and compensation for services rendered."

The language of this statute is about as broad and sweeping as it could well be, and would seem to leave no doubt that it was the purpose of the legislature to make the salary full compensation for all services performed by the clerk as clerk and vest the county with all moneys earned by the clerk in his capacity of clerk of the circuit court.

But it is argued with much ability by counsel for appellant that the statute only contemplates the fee system under state laws and was not designed to cover, and does not cover, fees earned under the act of Congress relating to naturalization. The question is not free from difficulty. The act of Congress was passed in 1906, being an act to establish a uniform rule for the naturalization of aliens throughout the United States, and providing fees to be charged by clerks of courts exercising jurisdiction in naturalization cases, and further providing that such clerks are authorized to retain a certain portion of the fees received and pay over the balance to the Bureau of Immigration and Naturalization. Act 59th Congress, June 29, 1906, ch. 3592, § 13, 34 U. S. Stats. at Large, 600 (U. S. Comp. Stats. Supp. 1909, p. 483).

Before the passage of the above act of Congress, the state courts, under power conferred by Congress, naturalized aliens, and the clerks were by state statute allowed certain fees for their services. Sec. 747, Stats. (1898). Much stress is placed by counsel for appellant upon the act of 1906 as a uniform rule of naturalization as affecting the fees of clerks of circuit courts in naturalization proceedings and removing them from the fee system of state courts. And it is argued that since the passage of said act of Congress, ch. 411, Laws of 1901, does not include fees in naturalization proceedings. This argument is based upon the exclusive power

of Congress on the subject of naturalization and the particular language of the act, and further that the resolution and law upon which the plaintiff rests applies only to fees provided for at the time of the adoption of the resolution, hence do not cover fees provided by the act of Congress passed in 1906 and subsequent to the passage of the resolution. The argument is ingenious, but it seems to us that the statute was intended to cover all fees and emoluments coming to the clerk in his official capacity while holding the office upon the salary basis. We think it cannot be successfully maintained that if during the salary term the legislature of the state should increase the fee bill under the fee system as to clerks of courts, the clerks, though on a salary, could retain in addition to the salary the extra fees provided for by legislative enactment after the salary had been fixed. No reason appears why the same rule should not apply to the change in fees by Congress after the adoption of the resolution. The fees and emoluments to be turned over under the statute (ch. 411, Laws of 1901) are such as have been received by such clerk, and he is required to make a sworn statement at the end of each quarter of all fees, *per diem,* and emoluments collected by him, and file it with the county clerk. The clerk, therefore, takes the office upon the salary fixed and must account to the county treasurer for all fees and emoluments received by him in his official capacity during his term. The question then arises whether the act of Congress passed after defendant was put on the salary basis alters the situation. It is urged that, because prior to 1906 there was no federal law providing fees for clerks in naturalization proceedings, the fees in question could not have been contemplated by the legislature. But fees were then prescribed by the state statute (sec. 747, Stats. 1898), hence some fees for such services must have been in contemplation. The fact that Congress had exclusive power when it assumed to act, and that the fees prescribed are at variance with the fees

fixed by state statute, we do not regard significant so long as the acts performed by the clerk were official in the discharge of his duty as clerk. The courts of the state designated in the act have power to naturalize aliens, and the clerks perform services as clerks in such proceedings and receive fees as clerks for such services, and, whether such fees are fixed by act of Congress or by state law, they are fees or emoluments of the office within the meaning of ch. 411, Laws of 1901. Even if it be true, as contended by counsel for appellant, that the power of Congress is exclusive (*State ex rel. Newman v. Libby*, 47 Wash. 481, 92 Pac. 350), and that the state law is superseded as to amount of fees, the fees are nevertheless emoluments of the office of clerk within the meaning of the state law.

It is further argued that the words of the act of Congress that the clerks are "authorized" and "permitted to retain one half of the fees" involve the granting of a privilege to hold the fees as their own. We think the words used in this connection have reference solely to the adjustment under the act of Congress between the clerks and the bureau. Clearly they cannot be held to authorize or permit the clerks on salary basis to hold them as against the counties, if they are fees or emoluments which belong to the counties. So we come back to the proposition whether they are or are not.

It is insisted that such services are performed in a nonofficial capacity, therefore belong to the clerks exclusively and are not covered by the state law or the resolution requiring fees and emoluments received by clerks in their official capacity to be turned over to the county. And it is argued that clerks would not be obliged to turn over money earned in work purely nonofficial, as, for example, time not required in discharge of official duty spent in bookkeeping. This might be admitted, but it does not reach the question, because in the case before us the services were strictly official. The naturalization proceedings are proceedings in

court, and the clerk in the performance of services therein acts in his official capacity as clerk of the court. The act of Congress purports to confer jurisdiction to naturalize aliens on "all courts of record in any state." And the courts of record in this state have uniformly from an early day assumed such jurisdiction, and the clerks of the circuit courts have acted in their official capacity in such proceedings before and since the act of Congress. That the circuit courts of the state have jurisdiction to naturalize aliens is beyond question. This is not denied by counsel for appellant, but it is argued that the jurisdiction is limited or *quasi*-judicial in its nature, and that Congress might designate the board of aldermen of cities to determine the requisite facts to entitle to citizenship under the conditions prescribed by law. Whether Congress could have conferred the power on other bodies than courts of record we need not determine. It is sufficient that it has authorized courts to perform the function and provided the fees to be received by clerks for the performance of their duties as clerks of courts in that regard. The courts, having assumed to act, have the right to do so in the absence of any law of the state prohibiting such action. *Prigg v. Comm.* 16 Pet. 539; *Stephens, Petitioner,* 4 Gray, 559; *Levin v. U. S.* 128 Fed. 826.

We shall briefly refer to some of the principal authorities relied upon by appellant's counsel. In *U. S. v. Hill,* 120 U. S. 169, 7 Sup. Ct. 510, under an act of Congress providing in effect that the clerk shall not be allowed to retain of the fees and emoluments of his office for his personal compensation over expenses, including clerk hire, to be audited and allowed by the proper officer, a sum exceeding $3,500, and that the accounts should be examined and certified by the judge and be subject to revision by the accounting officers, it appeared in the case that for a great number of years naturalization fees had not been included in such fees in the clerk's return. All the facts were known to the judge who

passed on the accounts and the general custom was acquiesced in for a long period of time. Under the act of Congress there was no fee provided for in naturalization proceedings, but a fee of $3 was by custom charged by the clerks, and the court made rules respecting naturalization proceedings and the services. At page 179 (7 Sup. Ct. 515) the court said:

"It is for services rendered under these rules, and as a special officer of the court, and not as clerk, that these fees have been permitted. They were not duties pertaining to the office of clerk. They could as well have been performed by any other person designated by the court for the purpose; as by the district attorney, or a commissioner of the circuit court, or an attorney, or any suitable person not an officer of the court."

In *U. S. v. McMillan,* 165 U. S. 504, 17 Sup. Ct. 395, the court followed the decision in *U. S. v. Hill, supra.* In *U. S. v. Brindle,* 110 U. S. 688, 4 Sup. Ct. 180, Brindle held a public office upon a salary, and the act of Congress prohibited receiving compensation for discharging the duties of any other office. He was appointed to perform a service in no way connected with the office he held, and which was not an office known to the law, and it was held that the service had "no affinity or connection, either in its character or by law or usage, with the line of his official duty." Mechem, Public Officers, § 863, lays down the general rule that one holding an office is not rendered legally incompetent to discharge duties clearly extra-official, outside of the scope of his official duty. In *Evans v. Trenton,* 24 N. J. Law, 764, the treasurer of the city of Trenton performed services not part of the duties of his office, and it was held that he was entitled to compensation therefor in addition to his salary as treasurer. In *Leavenworth Co. v. Brewer,* 9 Kan. 307, it was held that a county attorney is not bound to go beyond his county to do business for the county, and if he does he is entitled to reasonable compensation therefor in addition to his

salary. This was substantially ruled by this court in *Eagle River v. Oneida Co.* 86 Wis. 266, 56 N. W. 644, relied upon by appellant. In *Mayor v. Muzzy,* 33 Mich. 61, it was held that one who was mayor and councilman of a city and an attorney at law could act for the city and defend a suit against it and recover the value of his services. In *Kollock v. Dodge,* 105 Wis. 187, 80 N. W. 608, the points involved mainly were the scope of legislative power delegated to the city council and that under the delegated power the council determined that the services of the officer in question were not official, and that this was not an unwarranted exercise of power.

We have found this case by no means easy of solution. Some cogent reasons have been presented by counsel for appellant in support of their contentions. However, after a careful examination of the case, the court have reached the conclusion that the judgment below should be affirmed.

By the Court.—The judgment below is affirmed.

A motion for a rehearing was denied April 26, 1910.

BOUCHIER, Respondent, vs. HAMMER, Appellant.

March 18—April 26, 1910.

Appeal: Costs: Taxation after record remitted: Jurisdiction.

Costs may be taxed in the supreme court after the record in the case has been remitted to the trial court, no time limit being placed by statute on such taxation, and no modification of the judgment being involved therein.

APPEAL from a judgment of the circuit court for Price county: JOHN K. PARISH, Circuit Judge.

This is a motion by the respondent to review and set aside the taxation of costs by the clerk of the supreme court.

C. F. Lamb, for the respondent, in support of the motion.
John Morgan, for the appellant, *contra.*

PER CURIAM. Judgment of reversal having been rendered in the action November 12, 1909 [140 Wis. 648], and the record remitted to the trial court December 30th following, costs in this court were not taxed until March 5, 1910. The respondent appeared before the clerk at the taxation and objected to the taxation of any costs because the court had no jurisdiction. The objection being overruled and the costs taxed, a motion to review and set aside the taxation is now made in this court.

We are satisfied that the taxation was proper. The statute places no time limit upon the taxation of costs in this court. They are to be taxed and inserted in the entry of judgment on four days' notice, in accordance with the order of the court. Sec. 2952, Stats. (1898). Execution is to issue on the judgment out of this court, and satisfaction is to be entered by the clerk of this court. Sec. 2953, Stats. (1898). After the record has been regularly transmitted to the trial court this court has no power to vacate or modify the judgment in any way, because its jurisdiction for such purposes is at an end. *Ott v. Boring,* 131 Wis. 472, 110 N. W. 824, 111 N. W. 833. The taxation and entry of costs, however, does not affect or modify the judgment rendered, but simply is a clerical act which reduces to concrete figures the abstract command of the judgment already entered. Inasmuch as the judgment for costs must be enforced by process from this court and must be satisfied here, this court must necessarily retain power to do such acts pertaining to the enforcement, satisfaction, and discharge of the judgment as become necessary for the due protection of the parties. No other court has power to do these acts and certainly the power must be lodged somewhere. This court has offset two judgments rendered by it, though the records had been long

previously transmitted to the trial court. *Yorton v. M., L. S. & W. R. Co.* 62 Wis. 367, 374, 21 N. W. 516, 23 N. W. 401.

We conclude that the taxation of costs was properly made, and the motion is denied with $10 costs.

HERMANN, Respondent, vs. HERMANN, Appellant.

April 5—April 26, 1910.

Appeal: Divorce: Suit money: Temporary alimony.

A motion for suit money and temporary alimony pending an appeal in a divorce action is denied because, no bill of exceptions having yet been returned, the court is unable to say whether there are merits in the appeal.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge.

Andrew Gilbertson, for the appellant.

Geo. E. Ballhorn, for the respondent.

PER CURIAM. This is a divorce action. Judgment having been rendered in the trial court awarding a divorce to the defendant upon her counterclaim and making a final division of the plaintiff's property, the defendant has appealed from that part of the judgment only which divides the property, and now moves the court for suit money and temporary alimony pending her appeal.

It has long been settled that such motions are not granted as matters of course in this court. The record will be examined "so far as to determine whether the appeal is obviously without merits; and if it is then the motion will be denied. Injury and a meritorious cause of action must appear." *Friend v. Friend,* 65 Wis. 412, 27 N. W. 34, and

cases cited. No bill of exceptions has yet been returned to this court in the case, so that it is impossible for the court to determine these questions now. Hence the motion must be denied without prejudice to the right to make another motion after the bill of exceptions shall be returned.

It is so ordered.

See Supreme Court Rule 43*a*, adopted April 26, 1910, 141 Wis. page iv.—REP.

HARTUNG, Appellant, vs. HARTUNG, Respondent.

April 5—April 26, 1910.

Appeal: Divorce: Suit money: Temporary alimony.

A motion for suit money and temporary alimony pending an appeal in a divorce action is denied because, no bill of exceptions having yet been returned, the court is unable to say whether there are merits in the appeal.

APPEALS from a judgment and an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge.

Andrew Gilbertson, for the appellant.

L. G. Wheeler, for the respondent.

PER CURIAM. The plaintiff brought action for divorce against the defendant, and the same was tried, resulting in a judgment of dismissal upon the merits. Before the judgment was entered she brought another action, alleging some additional alleged cruel treatment occurring after the trial of the first action, and upon affidavits moved for temporary alimony and suit money in the second action, which motion was denied. She has appealed from the judgment in the first action, and from the order denying suit money and alimony in the second action, and moves this court for suit money and alimony upon each appeal.

Both motions must be denied. Upon the appeal from the judgment in the first action no bill of exceptions is yet returned, and we are unable to say whether there are merits in the appeal; hence no order will be made. *Hermann v. Hermann, ante,* p. 529, 126 N. W. 3.

Examination of the affidavits filed upon the appeal from the order in the second action satisfies us that the court properly refused to make the allowance applied for. Both motions will be denied without prejudice to the right to renew the motion in the first action when the bill of exceptions shall be returned.

It is so ordered.

MARINER and others, Appellants, vs. OCONTO LAND COMPANY, Respondent.

March 15—April 26, 1910.

Public lands: Grant to state for Sturgeon Bay canal: Grant by state: When title passes: Delay in issuance of patents: Taxation: Exemption: Conveyance by canal company: Quitclaim deed: Estoppel: Stare decisis: *Rule of property.*

1. The grant of lands to the state by the act of Congress of April 10, 1866, to aid in the construction of the Sturgeon Bay ship canal was, like all the national land-grant acts, a grant *in præsenti,* leaving nothing to be done, after acceptance of the grant, to pass title in trust, except to segregate the lands from the general public domain by due selection and certification.
2. When lands so granted to the state are re-granted by it for the purposes of the trust, the full equitable and beneficial title passes to the grantee of the state as soon as the lands are earned by compliance with the conditions of the grant and the facts in that regard are duly determined, and from that time the lands are subject to the taxing laws of the state, whether the legal title has or has not, in form, passed by the patent from the state or general government.

3. In ch. 105, Laws of 1868 (by which the lands granted to the state by the act of April 10, 1866, were "granted and conferred upon" the Sturgeon Bay and Lake Michigan Ship Canal and Harbor Company), the provision that, upon the filing of a certificate by the governor of the completion of the work, the lands "shall be patented . . . to said company, which shall stand seized and possessed of all said lands as fully as the state can convey the same, and free from any tax for the term of ten years, if so long held by the said company," did not operate to postpone until actual issuance of the patents the passing of full beneficial ownership of the lands with right of disposal, or the commencement of the specified period of exemption from taxation. *Wis. Cent. R. Co. v. Price Co.* 64 Wis. 579, 133 U. S. 496, followed.
4. After the canal company had acquired such beneficial ownership with right of disposal, a deed by which it granted, bargained, sold, assigned, and quitclaimed all its right, title, and interest in and to such lands, and all right, title, and interest which it then had or might thereafter acquire to select and have patented to it (should its full title fail) other lands in lieu thereof, conveyed, not merely a right to obtain the lands, but the full equitable title and beneficial interest possessed by the company; and such conveyance terminated the exemption of the lands from taxation under the act of 1868.
5. No tax can be imposed on lands while they remain the property of the United States, or on lands granted by the United States to the state in trust for works of internal improvement as to which the trust has not been executed; but when the trust has been executed and the lands fully earned they may be taxed, although the patents therefor, which are due, have not been issued. *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, distinguished.
6. The doctrine that when granted lands have been earned and all conditions precedent to the issuance of patents have been satisfied the title for all practical purposes, including that of taxation, passes into the field of private ownership, having been declared by this court twenty-five years ago, affirmed by the federal supreme court, and again recently declared by this court, has become a rule of property and is not now open to discussion.
7. Refusal by the state for a number of years to issue patents for certain lands granted by it to the Sturgeon Bay canal company, on the ground that such lands did not pass to the state under the grant made to it by the federal government in aid of said canal, but were owned by the state under a different grant, did not create an estoppel *in pais* precluding the state from treating the lands as subject to taxation during that time.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action to quiet title.

The cause involved the validity of certain tax deeds. Such validity turned on whether the lands were subject to taxation for the years the taxes on which the deeds were based were levied. The lands and others having been granted to the state by the general government in trust for a particular purpose and duly selected and segregated from the public domain, a contract to execute such purpose was made by it with the Sturgeon Bay and Lake Michigan Ship Canal and Harbor Company, under authority of ch. 105, Laws of 1868. Such purpose was to secure the construction of a breakwater and harbor at the head of Sturgeon Bay, in the county of Door, to connect the waters of Green Bay with Lake Michigan. Pursuant to such contract it was provided that upon the completion of specified portions of the work to the satisfaction of the governor he should certify the same to the company, specifying the proportion of lands earned to the company, and deposit a copy of his certificate in the office of the secretary of state, and thereupon that the commissioners of school and university lands should patent to the company such portion as selected by it and that it should be privileged to sell and convey the same, and upon the entire work contemplated being completed and duly certified to the governor and approved by him, he should certify the fact to the company and deposit a copy of his certificate in the office of the secretary of state and then that the remainder of the granted lands should be patented to the company by such commissioners with effect, as follows:

"Which shall stand seized and possessed of all said lands as fully as the state can convey the same, and free from any tax for the term of ten years, if so long held by the said company, and the said company shall use all due diligence in disposing of said lands at a fair and equitable price, and they

shall not be held by the said company for speculation, and when sold by said company they shall be subject to taxation: *provided,* that previous to the issue of a patent therefor or for any of said lands, said company shall reimburse the state for all expenses incurred on account of the same."

All conditions precedent to finally closing up the relations between the state and the company by issuance of the last patents were satisfied December 5, 1881, and the company was then and continuously thereafter entitled to have such patents issued to it or its grantees, till they were finally issued. Nevertheless patents to 2,000 acres of lands, including the particular lands in dispute, were not issued till June, 1901, because of an unfounded adverse claim of the state that they belonged to it under the federal swamp land grant, notwithstanding they had been segregated from the public domain and certified to it for the particular purpose covered by the contract aforesaid. In the meantime the company, subsequent to final completion of its work and it becoming entitled to patents as aforesaid, sold said lands, with all others earned by it under the contract and patented to but undisposed of by it, to *Ephraim Mariner* and Guido Pfister, as trustees, conveying the patented lands by warranty deed, and the lands to which those in suit belonged by quitclaim deed, as indicated by the following language of the conveyance:

"Has granted, bargained, sold and assigned and quitclaimed and by these presents does grant, bargain, sell, assign and quitclaim unto the said party of the second part, all its right, title and interest in and to the following described real estate and all its right, title and interest which it now has, or may thereafter acquire, to select and have patented to it (should the title to said party of the first part fail) other lands of the United States in lieu thereof. . . ."

Prior to the issuance of patents to the lands the full equitable title thereto and right to receive such patents became vested in plaintiffs and the patents were issued accordingly June 7, 1901. During the period intervening between

the time when said lands were earned by the company, as aforesaid, and June 7th, patents therefor were wrongfully withheld by the state by reason of its unfounded but good-faith claim before indicated.

For the purpose of taxation the quitclaimed lands were treated as subject thereto from and after the time they were deeded by the canal company as aforesaid. The taxes levied thereon for the years 1882, 1883, 1885, and 1887 were not paid and in due course and form tax titles of such lands, based on the taxes for such years, were perfected and by conveyances in due form vested of record in the defendant. In the situation stated,—the patent title to the lands in appellants and acquired subsequent to the levy of the taxes which were imposed thereon after the full equitable title had passed under the contract, as aforesaid, and the tax titles, as indicated, in the respondent, and circumstances existing rendering appellants competent to test the validity of such tax titles by an action against respondent to quiet title,—this suit was commenced. The trial court held as matter of law that the lands were taxable for the years the taxes were levied, upon which the tax titles were based, and that respondent was the owner of the lands by virtue of such titles, and rendered judgment in its favor accordingly.

For the appellants there was a brief by *Hooper & Hooper,* and separate briefs by *E. Mariner,* of counsel, and oral argument by *Moses Hooper.*

For the respondent there were briefs by *Greene, Fairchild, North & Parker,* and oral argument by *J. R. North.*

MARSHALL, J. It is conceded that the federal act was a grant of lands *in præsenti,* the language thereof being: "There be and hereby is granted to the state," etc., leaving nothing to be done to pass the title, in trust, except to segregate the lands from the general public domain by due selection and certification, which was done. Thus far the law is

firmly settled by many federal and state decisions. *Wis. Cent. R. Co. v. Price Co.* 133 U. S. 496, 10 Sup. Ct. 341; *St. Paul & P. R. Co. v. N. P. R. Co.* 139 U. S. 1, 11 Sup. Ct. 389; *U. S. v. S. P. R. Co.* 146 U. S. 570, 13 Sup. Ct. 152; *Wis. Cent. R. Co. v. Price Co.* 64 Wis. 579, 26 N. W. 93; *Chicago, St. P., M. & O. R. Co. v. Douglas Co.* 134 Wis. 197, 114 N. W. 511. In these and many other decisions it is held expressly, or in effect, that the intent of all the national land grant acts, of which the one in question is a type, was that upon acceptance of the grant the title should pass to the grantee as of the date of the act, subject only to exceptions as to claims to lands accruing subsequent thereto and before identification of the particular lands granted.

It is just as firmly established by the decision of this court in *Wis. Cent. R. Co. v. Price Co., supra,* affirmed in the federal supreme court, 133 U. S. 496, 10 Sup. Ct. 341, that the title to granted lands, regranted for the purpose of the trust, as in this case, passes to the grantee as soon as earned and the fact in that regard duly determined, and from such date the lands are subject to the taxing laws of the state whether the legal title shall have, in form, passed by patent from the state or general government or not; that is, upon all conditions precedent to passing of the legal title in the formal way being satisfied, leaving nothing to be done by the state or general government but to perform the contract obligations on its part, at least the full equitable and beneficial title to the lands passes to the ultimate grantee and such grantee thereby becomes, to all intents and purposes, the owner thereof, and particularly for purposes of taxation.

The doctrine, as stated, was very recently affirmed by this court in *Chicago, St. P., M. & O. R. Co. v. Douglas Co., supra,* as learned counsel for appellants appreciate, but it is insisted that the language of the act of 1868, "said lands shall be patented," etc., "to the said company which shall stand seized and possessed of all said lands as fully as the

state can convey the same, and free from any tax for the term of ten years, if so long held by the said company," negatives the idea that the legislature intended to make a grant of lands *in præsenti,* notwithstanding it used language in the granting clause substantially the same as that, over and over again, held to have such effect; that the language, "said lands shall be patented" "to the said company," followed by the words "which shall stand seized and possessed," etc., "free from any tax for the term of ten years, if so long held," etc., not only indicates an intent not to make a grant *in præsenti,* as had commonly been done, but to postpone the passing of the title for the purpose of taxation till conveyance of the legal title by patent, and, contingently, for a specified period thereafter, and that the words "so long held" refer to the words "shall be patented," etc., and mean "so long held" under the patent title.

The contention stated, supported as it is by able arguments of counsel, might cause considerable hesitation, at least, before reaching a conclusion in the negative, if it were not for the fact that the precise question, as it seems to us, was considered and decided in the *Wisconsin Central Case.* True, ch. 314, P. & L. Laws of 1866, considered in such case, did not contain the precise language depended upon by counsel for appellants in this case, but it did in effect. It provided that the railroad company should be entitled to the lands in portions applicable to specific sections of the road, as fast as such sections were respectively completed and the fact duly certified, but it contemplated certification to the secretary of the interior and patenting of the lands by the general government, direct to the railway company in accordance with the federal act, and provided that the title to the lands should not vest in the company sooner than lands might be sold, as provided in the act of Congress, but further provided, 'that the company should be capable in law of taking and holding any of the granted lands which should be conveyed to it by

the grantor by deed or operation of law, with full power of disposition of any title it might presently have or subsequently acquire.'

Referring to the federal act (Act of May 5, 1864, ch. 80, 13 U. S. Stats. at Large, 66) which was thus, in effect, incorporated into the state grant to the railway company, we find this language used, quoted in the *Wisconsin Central Case* as fixing the status of the company to earned but unpatented lands:

"Whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads . . . patents shall issue, conveying the said right and title to said lands to the said company entitled thereto. . . . The said lands hereby granted shall, when patented . . . be subject to the disposal of the companies respectively entitled thereto," etc.

This court held, and the federal supreme court affirmed, that ownership of the granted lands was not postponed to the patenting thereof, but that ownership of the full equitable and beneficial interest, at least, vested in the company as soon as the lands were earned and it was entitled to patents; that neither its right to full ownership nor the public right of taxation could be postponed by neglect to obtain the patents or refusal to issue them; that from the time patents were due the company, for all practical purposes, the company owned the lands; using the court's language, "the mere fact that the lands . . . were not held under patents from the United States did not prevent their being subject to taxation." Thus, in effect, holding that the language in the act of Congress, "said lands hereby granted shall, when patented," etc., "be subject to the disposal of the companies," etc., "respectively entitled thereto for the purpose aforesaid and no other," meant no more than that, neither before nor after patenting, should the companies have any disposable interest in the lands inconsistent with the purposes of the grant.

The contention was made, on the side of nontaxability of the lands, that the fair meaning of the granting act was that the beneficiary company should have no right to sell and dispose of the lands until it received patents, hence should not possess the lands till then and therefore could not, till then, have a taxable interest therein. Such contention utterly failed, as indicated, as one based on an unwarranted construction of the granting act.

True, the act in question contains, following the provision as to the duty of the commissioners of school and university lands, in a specified contingency, to issue the final patents, this language which appellants' counsel regard as of controlling significance: "which [the company] shall stand seized and possessed of all said lands as fully as the state can convey the same," not found in the national act of 1864 involved in the *Wisconsin Central Case*. But such language does not seem to indicate a legislative idea to postpone vesting of a disposable interest in the lands in the company till patenting thereof. As between that phrasing and the one in the national act, to the effect that the lands, when patented, shall be subject to disposal by the beneficiary, the latter much more than the former would so indicate. If the one does not, as this court and the federal supreme court has held, logically the other does not.

It will be noted that the language of the state act of 1868 rather negatives the idea that there was any legislative purpose to prevent the canal company from becoming possessed of the lands prior to the formal conveyance by patent. It seems to contemplate, at least, passing of the full beneficial interest in the lands to the company, by operation of law, upon all conditions precedent to patenting being satisfied, leaving the state the duty of making the formal transfer more as matter of evidence than actual conveyance of title, so words were used to the effect that the making and delivery of the patents shall give the company the status of being

seized of the land as fully as the state can convey the same. That suggests existence of seisin and possession of the lands by the company at the time of patenting, as regards all but the formal conveyance creating evidence of what had already been, to all intents, accomplished by force of the granting clause of the act, viz.: "said lands are hereby granted and conferred upon," etc., in connection with full performance of all conditions requisite to full seisin and possession.

It follows, necessarily, that the previous decision of this court rules both the proposition as to whether the contract with the canal company postponed its acquiring the status of a holder of the lands within the meaning of the act, and the one as to its competency of disposing thereof with due diligence within such meaning, rendering the lands taxable within the ten-year period of exemption, in favor of respondent.

In the foregoing we have not thought best to deal with rules for interpretation and construction, therefore we have not entered the field covered by the learned and interesting argument of counsel for appellants. If the proposition we have discussed was a new one, or if it was so far open to construction as to fairly admit of reading out of the act of 1868 a different situation than was presented in the *Wisconsin Central Case* under the act of 1866 and the national act of 1864, we could well give far greater significance to counsel's analysis of the act in question in the light of the judicial rules suggested. But when the legislative purpose of an act is evident and its effectuation does not lead to any absurd result, there is no uncertainty, hence no room for construction. As has often been said, we do not enter the field of construction till we pass the boundary between the field of certainty and that of uncertainty. Granting that, if the act in question could be viewed from an original standpoint, we would find ambiguity calling for construction or interpretation, or both, from the viewpoint of the decision in the *Wisconsin*

Central Case, which has been several times followed here and affirmed, as we have seen, and also by the highest court in the land, there is no ambiguity.

It is suggested that the contingency of the company ceasing to hold the lands, requisite to rendering them taxable, had not occurred prior to the levy of the taxes in question, therefore, they were not then taxable; that the company merely parted to the purchasers at the sale, *Mariner* and Pfister, its right to obtain the lands. That seems to be sufficiently answered by what has been said. The company certainly parted, at such sale, with all the interest it had in the lands. That interest, as we understand, was really conceded on the argument to be the full equitable title and beneficial interest as it was in fact. Moreover, the conveyance was not, as we view it, a mere power to ask for and obtain patents, but was a plain deed of bargain and sale but without covenants.

It is suggested that no taxes could legally have been imposed on the lands so long as the United States retained an interest which would be destroyed by taking the lands for taxes. The answer to that is that the United States had no such interest nor any interest whatever in the lands when the taxes were imposed. The whole title had passed to the state and practically from the state to the canal company, leaving only the duty of the state to properly evidence the fact by a formal patent, before the taxes were levied, as has been shown. So the principle suggested, granting its soundness for the purposes of the discussion, does not apply as to any interest of either the United States or the state.

The foregoing sufficiently answers the contention of the learned counsel for appellants, in their reply brief, that the state was prohibited from taxing the lands during the period the taxes in question were imposed, by sec. 2, art. II, of the constitution, which provides that "no tax shall be imposed on land the property of the United States. . . ." The lands here, prior to the imposition of such taxes, had ceased to be

property of the United States, as held in similar circumstances in the *Price County Case.*

We do not overlook the language and decision of this court in *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833. It was there held that "no tax can be imposed on lands while they remain the property of the United States." We reaffirm that doctrine. It was further held that, "No tax can be imposed on lands granted by the United States to the state in trust for works of internal improvement, and as to which the trust has not been executed." We also reaffirm that doctrine, but it does not militate against the taxes in question because, prior to their imposition, the trust had been fully executed.

We note fully this language in the opinion in the *Wisconsin Central Case,* cited with confidence to our attention in the reply brief, viz.:

"As fast as such lands have been earned by the railroad company under such grants, *and as the state* and United States have each parted with all right, title and interest therein to the company by patents regularly issued, the same become relieved, *pro tanto,* of the trust implied in the grant, and subject to the legislative will in the imposition of taxes." [*Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 95.]

The court in using such language was speaking to the facts of the case before it. The legislation, state and national, as in this case and in the *Price County Case,* contemplated issuance of patents to the grantee of the state, as evidence that the lands had been earned. The legislative act in that case, as in this and the *Price County Case,* contained words of grant *in præsenti,* subject to performance of the work of internal improvement the lands were designed to promote. The patents had actually been issued. Whether, notwithstanding the lands had been fully earned, rendering it obligatory upon the state to issue the patents, it had wrongfully neglected or refused to perform that duty, the power of taxa-

tion would thereby have been suspended, was not in the case. The court observed:

"There is no dispute but that the lands in question had, prior to the levying of the taxes in question, been earned by the plaintiff by fully completing the requisite section of its road, and that patents had been issued to the plaintiff, as required, thereby conveying to it the right and title to the lands in question."

Whether such right and title passed independently of the mere issuance of patents, so as to render the lands subject to taxation, but for the exemption act, the constitutionality of which was the main controversy, was not in issue. That very question, as we have seen, was, later, in the *Price County Case* involving lands granted under the same legislation, the vital one in issue and was decided in the affirmative, and such decision was affirmed in the federal supreme court, as before indicated, and the same doctrine was again declared in the recent case of *Chicago, St. P., M. & O. R. Co. v. Douglas Co.* 134 Wis. 197, 114 N. W. 511, as we have seen. Whether such doctrine, from an original standpoint, is logical or not, it has been the law of the state too long to be now open to discussion. It was declared a quarter of a century ago. It has the sanction of this court, of other state supreme courts, and of the highest court in the land. It is a rule of property and cannot now be departed from. Every reason now urged against it has passed in review, over and over again, with the result that, upon granted lands, as in this case, being earned and all conditions precedent to the issuance of patents being satisfied, the title for all practical purposes, including that of taxation, passes into the field of private ownership.

Counsel criticise the decisions of the Minnesota court holding that, under such legislation as that in question, the exemption from taxation terminates when the full equitable title passes from the state, notwithstanding there has not been any formal conveyance, thus construing the term "convey-

ance" in such legislation as satisfied when the full beneficial interest shall have passed. It is conceded that the decision of the Minnesota court was affirmed by the federal supreme court, but suggested that the reasons given for its conclusion are illogical and should not be followed, but rather the doctrine of *Wis. Cent. R. Co. v. Taylor Co., supra,* should control. The difficulty with that is that the Minnesota court only followed earlier decisions elsewhere on the same subject, they are not out of harmony with anything decided in the *Wisconsin Central Case,* this court reasoned on the same line in the *Price County Case,* and the federal supreme court in *Winona & St. P. L. Co. v. Minnesota,* 159 U. S. 526, 16 Sup. Ct. 83, only applied that which had been theretofore repeatedly declared to be the law, and notably in *Wis. Cent. R. Co. v. Price Co.,* involving the same legislation which this court discussed in *Wis. Cent. R. Co. v. Taylor Co., supra.*

In the later case the federal supreme court said, referring to previous decisions:

"This court held, as to lands purchased from the United States, that after the full equitable title had passed and the government simply held the naked legal title as trustee for the purchaser, they became subject to taxation. We concur in these views." [159 U. S. 530, 531.]

The court further reasoned that exemption statutes should be strictly construed in favor of the right of taxation and that, in legislation of the character of that under consideration, the term "conveyance" or "convey" should be held satisfied by the transition by operation of law of the full equitable title, unless a clear intent to the contrary appeared.

So it is too late now to seriously consider whether the reasoning of the Minnesota and other courts and the federal supreme court is or is not logical. It is the settled law of this state, as we have seen, as to legislation of the kind under consideration, even in case of its being so phrased as to entitle the person, or persons, or corporation, or corporations, earn-

ing the granted lands, to a formal conveyance by patent. Neither the neglect of those earning the lands to obtain the patents, or of the United States or state to issue patents, affects the taxability of the land from and after the patents are due.

It is somewhat uncertain, from the original printed argument, whether counsel for appellants maintain that the lands were not subject to taxation because, since the state, during all the years for which the taxes were levied, was insisting that it owned the lands under the swamp land grant; that they did not pass to the state under the grant in question and, upon that pretense, withheld from the canal company and its grantees the patents which should have been given, it and all state agencies and all persons claiming under the acts of such agencies are estopped from successfully claiming that the canal company's grantee, in fact, held the lands so as to be subject to taxation under the act of 1868. Counsel seemed, originally, to suggest the point rather as a reason for construing the act strongly in favor of appellants than as an estoppel, *in pais,* affecting the taxability of the lands. Counsel, in a carefully prepared supplemental brief, filed by consent of respondent's counsel, and duly considered, now seem to definitely insist upon the circumstances mentioned as creating an estoppel *in pais,* as well as significant in the field of construction. The latter has been sufficiently met. The former, it would seem, is sufficiently met by the logic of the situation.

The appellants, by the very doctrine they invoke, could not well insist that they in fact owned the lands, to all intents and purposes, only wanting the patent evidence thereof, which is really the effect of their contention; and at the same time insist that they were exempt from taxation because of the formality of issuing patents not having been satisfied. However, it seems that we need not discuss the matter at length unless we are prepared to overrule the decision in *Chi-*

cago, St. P., M. & O. R. Co. v. Douglas Co. 134 Wis. 197, 114 N. W. 511, and that in *Wis. Cent. R. Co. v. Price Co.* as well, wherein the precise question was decided, which we see no reason for doing as an original matter, and which we are precluded from doing, since the doctrine there declared has become a rule of property.

Some questions are raised, incidentally, in the briefs of counsel, which we have not specifically mentioned, but it is thought that what has been said sufficiently covers the ground traversed by counsel and leads to the logical conclusion that the judgment must be affirmed. Really, as frankly confessed by the able counsel who presented the case orally for appellants, the appeal does not present any new question for consideration, except whether peculiar wording of the act of 1868, conferring the lands in question on the canal company, takes it out of the rule of *Wis. Cent. R. Co. v. Price Co.* and similar cases—unless the questions decided in those cases may be regarded as open for re-examination.

By the Court.—The judgment is affirmed.

MENSFORTH, Appellant, vs. CHICAGO BRASS COMPANY, Respondent.

March 17—April 26, 1910.

Personal injuries: Release: Validity: Fraud in procuring: Negligence in signing: Ratification: Affirmance: Questions for jury: Return of money as condition precedent to action.

1. The question of the validity of a written release as a bar to an action for personal injuries was one for the jury, upon evidence tending to show that the writing was signed by plaintiff while he was in bed, weak and suffering from the injuries, and not able to read the paper or hear it when it was read; that he signed at the solicitation of an officer of defendant and upon representations by such officer, and by a friend of plaintiff whom

the officer had brought with him, that defendant was not liable in damages and that the money then paid and thereafter to be paid was a mere gratuity; and that plaintiff did not know what he was signing.

2. There could be no ratification or affirmance of such a release without full knowledge of the facts.
3. There can be no release of a cause of action without unequivocal acts showing expressly or by necessary implication an intention to release.
4. The acceptance of money by plaintiff after the signing of the release was not an affirmance thereof unless the money was paid in satisfaction of the cause of action or received by plaintiff after he knew or ought to have known that he had a cause of action and that the money was paid in satisfaction of it.
5. The obtaining of such release under the circumstances stated was a fraud, constructive if not actual, upon plaintiff if he had in fact a cause of action and defendant knew or ought to have known that fact.
6. Whether plaintiff was guilty of negligence in signing the release without knowledge of its contents was, upon the evidence, a question for the jury.
7. Where the payment of money by defendant to plaintiff was not understood by either to be in settlement of a disputed liability it was not necessary for plaintiff to return or offer to return the money before suing upon that liability.
8. Per WINSLOW, C. J., and BARNES, J.: Even if, in this case, defendant paid the money upon the understanding that it was in settlement of plaintiff's claim, yet if plaintiff without negligence accepted the money in the belief that it was a mere gratuity, and such belief was induced either by defendant's actual fraud or by its failure to explain properly the true character of the release, defendant cannot be heard to say that the money was paid in settlement of the liability.

APPEAL from a judgment of the circuit court for Kenosha county: J. C. LUDWIG, Judge. *Reversed.*

This action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff in consequence of the defendant's negligence. The plaintiff was engaged with several others in erecting a factory building for the defendant, and while so engaged one of the walls fell and seriously injured the plaintiff. It is alleged that the

wall fell through the defendant's negligence and that the defendant is liable to the plaintiff for the damages sustained. Defendant denies negligence, and among other defenses sets up that on the 12th day of October, 1907, the plaintiff, for a good and valuable consideration, did acknowledge full satisfaction and discharge of all claims in respect to all injuries or injurious results arising from the facts alleged in the complaint as constituting the plaintiff's cause of action. The plaintiff put in his proof and rested, and thereupon it was stipulated that the issue of release and satisfaction set up in the answer be first tried, and upon that issue the defendant put in evidence a written paper purporting to be a satisfaction and discharge of all claims accruing or to accrue on account of injuries sustained at the time and place alleged in the complaint. Considerable evidence was put in on both sides respecting this alleged release and as to whether or not it barred the plaintiff's cause of action. At the close of the evidence on this issue the court directed that the complaint be dismissed on the ground that, while it was a jury question whether the release was valid and a bar to the plaintiff's cause of action at the time of its execution, the evidence as to the acts and conduct of the plaintiff thereafter and down to about the time of the commencement of this action showed conclusively that after the execution of the alleged release plaintiff knew the nature thereof and that it was a settlement, and affirmed it, and therefore the evidence established as a matter of law that the release barred the plaintiff's action. A verdict was directed for the defendant and judgment dismissing the complaint entered, from which this appeal was taken.

For the appellant there was a brief by *Calvin Stewart* and *Wallace Ingalls,* and oral argument by *Mr. Stewart.*

For the respondent there was a brief by *Harper & McMynn,* attorneys, and *Peter Fisher,* of counsel, and oral argument by *R. N. McMynn.*

The following opinion was filed April 26, 1910:

KERWIN, J. The questions involved are whether the writing signed by the plaintiff was, when signed, a valid discharge of his cause of action set up in the complaint, or whether, if not such when signed, it became so by the subsequent acts and conduct of plaintiff. The court below held that it was a question for the jury whether the release when executed discharged and satisfied the plaintiff's claim, but that the evidence established as matter of law that the plaintiff, after the signing of the release, affirmed it, and thereby made it a valid release and satisfaction of his cause of action, and directed a verdict for the defendant.

The release in question purports on its face to satisfy and discharge all claims for damages growing out of the accident, and was signed at the hospital ten days after the injuries were received and while the plaintiff was in bed suffering pain. The evidence tends to show that he had to be propped or held up in bed while he signed, and that he had no glasses and could not read the paper without them, and was deaf, and when the paper was read by the officer of the defendant he heard only a few words of it, and that the whole thing seemed to him like a flash in a dream; that defendant's officer who procured the release represented to plaintiff before he signed that they had looked into the case and were not to blame for the falling of the wall, and that it was an accident, but that they would still keep him, pay expenses and doctor's bill and a few dollars to reimburse him. Plaintiff testified that he caught a few words when the paper was being read to him, and said, "But after that I dwindled down," and that he did not know what he was signing, and did not know that the paper he signed contained a release of his damages against the defendant, if he had any. No inquiry was made at the time of signing the release as to the extent of the injuries, and there is

nothing in the evidence going to show that the defendant then considered that there was any liability and represented to plaintiff that there was not and that the settlement was not based on compensation for the injuries, but that what it was doing for plaintiff was a mere gratuity, except from what appeared upon the face of the instrument signed by the plaintiff. The plaintiff was earning when injured about $100 per month, and was sixteen weeks in the hospital after the injury. He received after signing the receipt $100 in three instalments, and nothing was said when the money was paid to him as to what it was for. Without further detailing the evidence the court is of opinion that the question of the validity of the release as a bar to the cause of action set up in the complaint was for the jury. *Lusted v. C. & N. W. R. Co.* 71 Wis. 391, 36 N. W. 857; *Schultz v. C. & N. W. R. Co.* 44 Wis. 638; *Union Pac. R. Co. v. Harris,* 158 U. S. 326, 15 Sup. Ct. 843; *Smith v. Occidental & O. S. Co.* 99 Cal. 462, 34 Pac. 84; *Bussian v. M., L. S. & W. R. Co.* 56 Wis. 325, 14 N. W. 452; *Atchison, T. & S. F. R. Co. v. Cunningham,* 59 Kan. 722, 54 Pac. 1055.

A valid release in writing sufficient to bar the plaintiff's claim not having been established as a matter of law, it becomes necessary to determine whether the evidence on affirmance or ratification justified the court in directing a verdict for the defendant. The evidence, as well as the legal inferences to be drawn therefrom, as to whether there was a release of the plaintiff's cause of action is conflicting. The plaintiff never saw the release after it was signed until it was produced upon the trial of this action; nor did he have any definite knowledge that a cause of action existed in his favor against the defendant until shortly before he commenced this action. True, there is some evidence that several months after the release was signed he was informed that he had jeopardized his case by signing the release.

But the evidence is vague and indefinite and not sufficient to inform him that he in fact had a cause of action or the nature of the release he had signed, or warrant him in beginning suit until he was finally informed about the defective construction of the wall by one Johnson, who was also injured, and that he then advised his attorney to bring this action. There could be no affirmance or ratification of the release without full knowledge of its terms. Nor could there be a release of the cause of action without unequivocal acts of plaintiff showing expressly or by necessary implication that he intended to release. And there can be no ratification or affirmance unless plaintiff knew or ought to have known all the facts and circumstances attending the act to be ratified. *McDermott v. Jackson,* 97 Wis. 64, 72 N. W. 375; *Herring v. Skaggs,* 73 Ala. 446; *Pfeiffer v. Marshall,* 136 Wis. 51, 116 N. W. 871. Ratification presumes the existence of knowledge of all the facts, and one not informed of the whole transaction is not in a position to ratify the same. *King v. Mackellar,* 109 N. Y. 215, 16 N. E. 201. Nor was the receipt of the $100 an affirmance of the release unless paid in satisfaction of the plaintiff's cause of action, or received after he knew or ought to have known that he had a cause of action and that the money was paid in satisfaction of it. There is evidence that the defendant did nothing but what it offered to do on the theory that plaintiff had no cause of action against it, and that the $100 was paid long before plaintiff received the information from Johnson which induced him to bring the action.

The transaction involved in procuring the release on its face bears the impress of unfairness. The plaintiff was in the hospital only ten days when the release was procured and remained there fourteen or fifteen weeks thereafter. When he signed the paper he was suffering pain and was unable to sit up, and not in condition to carefully consider his

rights in the matter. A friend of his accompanied the officer of defendant to aid in getting the release signed. No inquiry was made as to the extent of the injuries and no pretense to settle for them, but, on the contrary, the officer of the defendant represented to plaintiff that he had no claim for damages. Such practice was a fraud, constructive if not actual, upon the plaintiff, if he did in fact have a cause of action and the defendant knew or ought to have known that such claim for damages existed. *Lusted v. C. & N. W. R. Co.* 71 Wis. 391, 36 N. W. 857. In *Atchison, T. & S. F. R. Co. v. Cunningham,* 59 Kan. 722, 727, 54 Pac. 1055, 1057, the court in referring to such a settlement said:

"Where such unseemly haste is made in obtaining settlements with parties who have sustained such serious injuries, and where the amount paid is so trifling and utterly disproportionate to any just compensation, it seems like wasting time to nicely discuss questions of evidence bearing on the plaintiff's capacity to transact business."

It cannot be said that the case before us comes within the class where negligence in signing a paper prevents the party from afterwards questioning its contents. Here the plaintiff's condition at the time, the fact that his friend and colaborer accompanied the officer of the defendant and who doubtless was brought because of his intimacy with and influence upon plaintiff, the assurance by his friend as well as by the officer of the defendant that he had no claim against the defendant, together with all the circumstances of the case, made it a jury question whether he was guilty of negligence in signing the release without knowledge of its contents. *Lusted v. C. & N. W. R. Co.* 71 Wis. 391, 36 N. W. 857; *Griffiths v. Kellogg,* 39 Wis. 290. Nor was it necessary to return the $100 received before commencement of action. There is an abundance of authority to the effect that, where the payment was not understood by either party to be in

settlement of a disputed liability, a return or tender of return of the money is not necessary. *Ill. Cent. R. Co. v. Edmonds* (Ky.) 111 S. W. 331; *Continental T. Co. v. Knoop* (Ky.) 71 S. W. 3; *St. Louis, I. M. & S. R. Co. v. Brown,* 73 Ark. 42, 83 S. W. 332; *Ingram v. C., F. & A. R. Co.* (Ky.) 89 S. W. 541; *O'Brien v. C., M. & St. P. R. Co.* 89 Iowa, 644, 57 N. W. 425.

Counsel for defendant relies upon *Steffen v. Supreme Assembly,* 130 Wis. 485, 110 N. W. 401; *Kowalke v. Milwaukee E. R. & L. Co.* 103 Wis. 472, 79 N. W. 762; *Schiefelbein v. Fidelity & C. Co.* 139 Wis. 612, 120 N. W. 398; *E. Bement & Sons v. La Dow,* 66 Fed. 185; and 1 Beach, Modern Law of Contracts, § 821.

In *Steffen v. Supreme Assembly, supra,* while the rule is laid down that in order to impeach a written agreement on the ground of fraud or mistake the evidence must be clear and convincing beyond reasonable controversy, the court, further referring to the fact that the paper and the testimony offered show that plaintiff deliberately and with full understanding entered into an agreement to settle her claim for $100, holds that this is not enough to warrant a directed verdict if the plaintiff's evidence, "standing alone and undisputed, can, with reason, be deemed sufficient to prove with the requisite clearness and conclusiveness that her signature to the writing was induced by fraud or mistake." See, also, the late case of *Lepley v. Andersen, post,* p. 668, 125 N. W. 433.

Kowalke v. Milwaukee E. R. & L. Co., supra, involves a full discussion of what are and what are not covered by settlements, though not definitely known at the time of settlement; in other words, what ignorance of fact concerning extrinsic matters is sufficient, if at all, to warrant setting aside a settlement where the subject matter of the cause of action is the basis of settlement. In that case the parties intended

to settle the cause of action. At page 480 of 103 Wis. (79 N. W. 765) the court said:

"The question in each such case is: Did the minds of the parties meet upon the understanding of the payment and acceptance of something in full settlement of defendant's liability? If they did, without fraud or unfair conduct on either side, the contract must stand, although subsequent events may show that either party made a bad bargain, because of a wrong estimate of the damages which would accrue."

This language is quoted with approval in the late case of *Schiefelbein v. Fidelity & C. Co.* 139 Wis. 612, 120 N. W. 398. In the instant case it was a jury question whether the plaintiff intended or considered at all settlement of the cause of action sued upon.

E. Bement & Sons v. La Dow, 66 Fed. 185, is a case which involved a contract alleged to have been induced by fraudulent representations, and it was held that there was no evidence of fraudulent representations, and, moreover, that there was ratification with full knowledge of the facts and also profits realized by the party under the contract who sought to avoid it.

None of the authorities cited by defendant are controlling against the plaintiff here. The court is of opinion that whether plaintiff should be bound by the release, or ratified and affirmed it, were jury questions. At the close of plaintiff's evidence defendant moved for a nonsuit, which was overruled without argument, and, as appears from the record, with the observation by the trial judge that the question could be taken up later. But as the court held that sufficient proof of release was made, as matter of law, it became unnecessary to further consider the merits of the motion for nonsuit, and it was not done; nor were the merits of the motion argued here. We therefore desire to say in closing that this court does not decide whether the motion for nonsuit should have been granted, and the decision here is

without prejudice to defendant's right to litigate that question upon another trial.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

TIMLIN, J., dissents.

The following opinion was filed May 24, 1910:

WINSLOW, C. J. (*concurring*). While I agree that it was not necessary for the plaintiff to return or offer to return the money received by him from the defendant in order to entitle him to maintain his action, I do not agree with the grounds stated for the ruling, namely, that "where the payment was not understood *by either party* to be in settlement of a disputed liability, a return or tender of the return of the money is not necessary." Of course this is true as an abstract proposition, and it would apply to this case if the testimony were undisputed to that effect; but it is not. On the contrary, the testimony of the defendant's witnesses, Shearer and Cox, is positive to the effect that Shearer offered to pay the plaintiff's medical expenses, hospital bills, and $100 in cash if he (plaintiff) "would sign an agreement releasing us from liability," and that the plaintiff understood the proposition, discussed it, read the duplicate releases, and finally signed them with full understanding that the transaction was a settlement of any claim that he might have, just as the written release describes it to be. From start to finish, the defendant's officers, while denying liability, have maintained that this transaction was a complete settlement of any claim which the plaintiff had or thought he had arising out of the accident. So it seems entirely clear to me that this is not a case where it can be said that the evidence shows as matter of law that the "payment was not understood by either party to be in settlement of a disputed liability."

But the plaintiff claimed, and testified to the effect, that he was in bed and partially unconscious from the effects of his injury when the release was presented to him; that he was in a dazed condition; that he did not know what was in the release, did not hear it read, and did not and could not read it himself, and did not know what he was signing; that nothing was said to him about settlement of his claim for damages, but that he was simply told that the company would pay his doctors' bills and give him a few dollars to reimburse him. If the jury believed these statements and believed that he was not negligent in failing to ascertain the character of his release, then it would not be necessary for the plaintiff to return the money received in order to maintain his action, for the plain reason that the defendant could not now be heard to say that the money was paid in settlement of the liability for the accident, if it be a fact that the plaintiff without negligence took the money under the honest belief that it was merely a gratuity, and such belief was induced either by the actual fraud of the defendant or by lack of proper explanation of the true character of the release.

BARNES, J. I concur in the views of the chief justice.

GRAUMAN, MARX & CLINE COMPANY, Respondent, vs. KRIENITZ, imp., Appellant.

March 19—April 26, 1910.

Infants: Judgment by default: Failure to appoint guardian ad litem: *Vacating judgment: Estoppel: Fraud: Contracts not beneficial: Accommodation paper.*

1. An application to vacate a judgment by default against a minor on the ground that he was not represented by a guardian *ad litem* is addressed to the sound discretion of the court, guided, however, by the settled policy of the law that a person under disability is entitled to reasonable opportunity to be heard in

court by a qualified representative during his disability, or by himself after the disability shall have been removed.

2. Neither mere acquiescence by the minor while under disability nor mere inconvenience and cost of litigation to the adverse party is sufficient to justify the denial of such an application.

3. A minor may by his own fraud estop himself from avoiding a contract on the ground of infancy; but (except, perhaps, in some extreme cases) he cannot do so unless he had actual, though not legal, discretion, and was guilty of actual fraud, as by express representation of capacity to contract, inducing the other party to enter into the agreement, nor unless the contract was beneficial to the minor.

4. Thus, a minor is not estopped, even by actual fraud, from avoiding a contract not beneficial to him, as in the case of his having become a mere surety or accommodation maker of a promissory note.

5. A judgment by default rendered against a minor properly served with summons but not represented by a guardian *ad litem*, is not void or open to collateral attack, but may be avoided by appeal for error if the minority appears of record, or if not, then only by direct proceeding in the action, seasonably taken, as by motion to set aside the default and permit the minor to defend.

6. While a judgment against a minor will not necessarily be set aside for irregularity, either during the disability or after it has been removed, if the minor has suffered no substantial injustice, this rule has no application to a case where there was no liability enforceable against the minor in the first instance.

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

The appeal is from an order denying the application of defendant, who was under twenty-one years of age, to vacate a judgment against him and permit him to defend.

The action was to recover on a promissory note upon which appellant was an accommodation maker. The complaint was duly verified. No answer was served. Judgment by default was taken, in due course. Nothing appeared of record indicating that appellant was a minor. Execution was duly issued on the judgment and returned unsatisfied. Several months after judgment, supplementary proceedings were commenced against appellant, whereupon he appeared and secured appointment of a guardian *ad litem* to represent him

and institute and carry on due proceedings to open the default and obtain leave to defend. A motion was duly made to vacate the judgment. Upon such motion defendant tendered an answer, pleading that he signed the note as an accommodation maker, only, and that he was a minor at the time of so signing and still was such.

The motion was supported by affidavits on defendant's behalf that he, at first, became a guarantor for his codefendant at the request of her husband; that she desired to purchase millinery goods of plaintiff and could not do so without a guarantor of payment therefor; that later, when the indebtedness incurred on the faith of the guaranty, amounting to some $472, became due, defendant was asked by plaintiff's attorney to settle therefor; that defendant then claimed he was not liable because he was a minor; that, as a result of some negotiations, the claim was settled by the note in suit, signed by defendant as an accommodation maker and a personal note of the principal debtor for the balance.

The affidavits tended strongly to show that the settlement was made, and guaranty surrendered to defendant, on the faith of his representation, by conduct, or words that he had arrived at the age of twenty-one years. Whether he expressly so represented was disputed, the preponderance of proof being in the negative. There was a conflict as to whether defendant represented himself to be of age when the guaranty was signed, but the preponderance of proof was in the negative. The affidavits, pretty clearly, showed that plaintiff supposed, and had reasonable ground to suppose, defendant was of age when he signed the guaranty and, later, when the note was signed, its agent supposed, and had reasonable ground to suppose, he was of age, but in fact that he was not; that no benefits whatever came to defendant, at any time, for signing either guaranty or note; that he paid no attention to the litigation after the summons was served, but left the matter wholly to his codefendant to attend to till several

months after judgment, when he was aroused to activity by institution of the supplementary proceedings. He was matured, beyond an ordinary person of his years, at the time he signed the guaranty. He had and was conducting a business of his own and had taken a place in the community as a business man; the appearances being such that one would naturally have supposed he was of age. He was influenced to his attitude, at the time of signing the note, somewhat, because he desired his father not to know that he had been allowing such use of his name.

For the appellant the cause was submitted on the brief of *Blenski & Cordes.*

Albert M. Newald, for the respondent.

MARSHALL, J. The situation, in brief, stating it as favorably for respondent as the moving papers will reasonably permit of, is this: Respondent and its agent believed, as above indicated, that when appellant signed the guaranty, he was of age, and, so believing, accepted him as security for payment of the indebtedness afterwards incurred. It did not, at the time the note was given, concede that he was not liable on the guaranty. When the note was signed respondent's agent believed that, if appellant were not of age in the first instance, he had arrived at his majority in the meantime. Respondent in the last instance, as in the first, was led to do what it did, by appellant, either by express declaration or otherwise, suggesting that he was of age and, manifestly, for the purpose of inducing the former to so believe. Respondent relied upon such belief in all that it did to enforce collection of the claim up to the time appellant claimed, in the supplementary proceeding, that he was still in his minority. It incurred danger of loss by selling goods on the faith of the guaranty and incurred loss to a considerable amount in reliance upon the note, if he shall be heard, successfully, to claim he was a minor when he signed the paper and when he

petitioned for leave to defend against the same notwithstanding the judgment. If he were an adult his laches after service of the summons would justify the refusal to grant relief.

An application to set aside a default, in a case of this sort, notwithstanding the minority of appellant, is addressed to the sound discretion of the court, but such discretion must be guided by the settled policy of the law, that a person under disability is entitled to reasonable opportunity to be heard in court by a qualified representative during his disability, or by himself after the disability shall have been removed. Such exceptions as there are to such policy are so rare that the rule is well nigh universal. So, whether the trial court failed to exercise its discretion in this instance, either because of misconception of the law or abused it by too severe an application thereof, or by misconceiving the effect of the facts, must be answered from the standpoint of the well settled policy referred to.

That a minor defendant should be represented by a guardian *ad litem*, is too familiar to require to be more than stated. It is laid down in the elementary works thus:

"It is an almost universal rule that where an infant is a defendant a guardian *ad litem* must be appointed for him to conduct the defense. The reason of this rule is plain, for it is evident that the privileges of an infant with regard to contracts and other transactions would be of slight utility if he were liable to be dragged into court and exposed there, unprotected in his ignorance, to contend with learning and experience. It is to protect him against such danger that the law assigns him a guardian in the suit." 10 Ency. Pl. & Pr. 618.

Going back to the guaranty on the note, it is conceded, as the fact is, that the contract of a minor, other than for necessaries, is either void or voidable at his option, exercised within a reasonable time after his coming of age. Such a contract, not for necessaries, is, as a rule, voidable by the minor at his option, reasonably exercised, upon his coming of

age and restoring the former situation as far as he is reasonably capable of doing so. There is an exception to that, generally recognized by the courts, including our own, of which *Knaggs v. Green,* 48 Wis. 601, 4 N. W. 760, and *Thormaehlen v. Kaeppel,* 86 Wis. 378, 56 N. W. 1089, are illustrations. That is this, a minor may, in making a contract beneficial to himself, under some circumstances, preclude himself, by equitable estoppel, from subsequently avoiding it on the ground of his infancy. The basic circumstance rendering that applicable is actual fraud; express representation of capacity to contract, inducing the adverse party to enter into the agreement. Many illustrative cases are cited in the brief of counsel for respondent. The following are a few of them, and others: *Hayes v. Parker,* 41 N. J. Eq. 630, 7 Atl. 511; *Commander v. Brazil,* 88 Miss. 668, 41 South. 497; *Ostrander v. Quin,* 84 Miss. 230, 36 South. 257; *Whittington v. Wright,* 9 Ga. 23; *Sanger v. Hibbard,* 2 Ind. Terr. 547, 53 S. W. 330; *Steed v. Petty,* 65 Tex. 490; *Williamson v. Jones,* 43 W. Va. 562, 27 S. E. 411; *Harmon v. Smith,* 38 Fed. 482.

An examination of the cited cases will demonstrate that the rule that an infant may bind himself by his actual fraud, but not by mere conduct or silence when he ought to speak, is very guarded. It forms an exception to the one that an infant or other person under disability cannot bind him or herself by estoppel. It is confined to cases where the infant, though under legal discretion, is in fact developed to the condition of actual discretion. It is further confined to cases of actual fraud and where the contract or transaction is beneficial to the minor. The rule being purely of equitable nature, it may be that, in a case of great hardship to the adverse party and substantially the same discretion on the part of the minor as if he were of age, the equity of the law will stand in the way of the latter to prevent such injury by closing the judicial ear to his appeal for assistance to avoid his

obligation. But the decided cases do not furnish illustrations of such extension. However, the precedents would not limit the power of the court to extend the principles of equity where necessary to effect justice.

This court recognized the general rule in *Thormaehlen v. Kaeppel, supra,* in these words:

"We suppose, of course, that a court of equity would refuse to relieve an infant of his contract if his own fraud induced the other party to enter into it."

And further, in effect, but if the minor merely fails to impart information of his age, unasked, there being no misrepresentation of fact and no artifice employed to mislead the other party, he is not guilty of that species of fraud which will estop him from pleading his minority to avoid the contract. The court had no need at that point, to deal with the other feature essential to create the estoppel, viz., that the contract must be beneficial to the minor. So one might be misled by reading the court's observation, which was not so guarded as to suggest such essential.

Enough has been said to demonstrate that a minor cannot, unless in some extreme cases of which this is not a type, even by actual fraud, estop himself from pleading his minority to avoid a contract which is not beneficial to him; as in case of his becoming a mere surety or accommodation maker of a promissory note.

The element of actual discretion on the part of the minor, characterized the instant transaction, but not that of beneficial nature to the minor, nor such extreme hardship to the other party as to warrant the doctrine of estoppel being applied. The learned trial court, quite likely, was misled by the general language in *Thormaehlen v. Kaeppel, supra,* and by overlooking the closeness with which the doctrine that a minor may estop himself by his fraud from asserting his infancy to avoid his contract, is fenced about: (1st) By necessity for actual discretion; (2d) necessity for actual fraud; (3d) necessity for beneficial nature of the transaction to the

minor. Had these essentials been appreciated fully, the application for leave to defend against respondent's claim, notwithstanding the default, would probably have been granted.

True, a judgment rendered against a minor where he is not represented by a guardian *ad litem,* is not void. Such representation is not jurisdictional. Notwithstanding absence of it the judgment is proof against collateral attack. It can only be avoided by appeal for error, where the minority appears of record, or otherwise by motion or other direct proceeding in the action seasonably resorted to. This, of course, contemplates jurisdiction obtained by proper service of the summons as required by law. There was such service in this case. While the mere neglect, regardless of the cause of it, the court having jurisdiction to have a minor defendant represented by a guardian *ad litem,* is not jurisdictional, the rule indicated obtains by the great weight of, though not the universal authority. 1 Black, Judgments, § 193, note 34. The federal supreme court is in the former class. *O'Hara v. MacConnell,* 93 U. S. 150. Some suggestions in authorities the other way are regarded as rather inconsequential.

So appellant took the proper course to avoid the effect of the judgment. He could not have reached the infirmity by appeal, since it does not appear of record. There is no question but that his motion was seasonably made as to the mere element of time. There was no element of actual fraud which stood in the way. Mere acquiescence, while under disability, was not sufficient to justify denying the motion. True, the court might, for sufficient equitable considerations in such a case, deny relief. But the policy of the law to afford a minor a day in court, properly represented by guardian *ad litem,* or after removal of the disability to be heard, is so general that something of an extraordinary character would be required to create an exception; something far more serious than such mere inconvenience and cost of litigation to the adverse party, as in this case.

It is not to be understood that judgments characterized by

irregularity, as in this case, can always be set aside either during disability or after it has been removed. In case, notwithstanding the irregularity, the minor suffered no substantial injustice, relief is not, necessarily, grantable. That, of course, would not include a case like this where there was no enforceable liability in the first instance.

It follows that the order appealed from must be reversed, and the cause remanded with directions to grant appellant's motion.

By the Court.—So ordered.

SCHEINER and others, Respondents, vs. ARNOLD, imp., Appellant.

April 5—April 26, 1910.

Partition: Reimbursement of tenant in common for improvements, etc.: Pleading: Counterclaim: Husband and wife.

1. In an action for partition of land the claim of a defendant for reimbursement, out of the proceeds of a sale of the premises, for moneys expended by him as a tenant in common in making permanent improvements enhancing the value of the land and in discharging a mortgage thereon, is pleadable as a counterclaim.
2. One who paid off a mortgage on his wife's land and expended moneys in permanent improvements thereon during her life under the mistaken impression that he was a joint owner has no claim legal or equitable to reimbursement which can be allowed in an action for partition of the land among the heirs of the wife, in the absence of any agreement that he was to be reimbursed or of facts showing that he was to be subrogated to the rights of the mortgagee.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This action was brought for partition of the lands described

in the complaint. The complaint is in the usual form and alleges that on the 18th day of March, 1908, Agnes Arnold, formerly Wiesner, being the owner in fee of the real property described in the complaint, died intestate; that said Agnes Arnold left her surviving *John C. Arnold,* her husband, one of the defendants, Charles Strellmann, Jacob Scheiner, William Wiesner, and Harry Wiesner, her sons, and James P. Scheiner, *Flora A. Scheiner,* and *Ethel I. Scheiner,* the only children and heirs at law of Joseph Scheiner, deceased, who was a son of said Agnes Arnold and who died prior to the death of said Agnes Arnold; that said Agnes Arnold never had children by the said *John C. Arnold* and that he is not entitled to any estate by the curtesy as such husband; that said premises descended to said parties to this action, excepting only the said *John C. Arnold,* in the following proportions, to wit: to said *Flora A. Scheiner, Ethel I. Scheiner,* and James P. Scheiner, and to each of them, an undivided one-fifteenth interest therein, and to the said Charles Strellmann, Jacob Scheiner, William Wiesner, and Harry Wiesner, and to each of them, an undivided one-fifth interest therein; that on or about the 21st day of March, 1908, said William Wiesner and Harry Wiesner conveyed to *John C. Arnold* an undivided one-half of their right, title, and interest in said premises, which deed was recorded on the 23d day of March, 1908, in the office of the register of deeds for Milwaukee county, in volume 525 on page 524; that the parties to this action have the following undivided estates in said premises: *Flora A. Scheiner, Ethel I. Scheiner,* and James P. Scheiner, and each of them, an undivided one-fifteenth in fee; Charles Strellmann, Jacob Scheiner, and *John C. Arnold,* and each of them, an undivided one-fifth in fee; William Wiesner and Harry Wiesner, and each of them, an undivided one-tenth in fee; Emma Strellmann, Amelia Scheiner, and Julia Arnold, and each of them, an inchoate right of dower in the undivided one-fifth interest owned by their respective husbands; that the plaint-

iffs, and each of them, are desirous of partition of the premises; that the lands described in the complaint are all the lands in the city of Milwaukee in which the parties to this action have any interest either jointly or in common, and that no other persons have any interest or estate in said lands; that during the time plaintiffs and defendants have owned the premises the defendant *John C. Arnold* has occupied the premises and utilized the same as a home and for the purpose of conducting a gardener's and florist's business thereon; that said *John C. Arnold* has not paid any rent for the use of said premises since March 18, 1908, although demand therefor was made, and that said defendant *Arnold* still fails, neglects, and refuses to pay rent.

The prayer is for partition of the premises according to the rights of the parties interested, and for a sale if it appears that partition cannot be made without prejudice to the owners; that the proceeds of sale be brought into court and divided among the parties according to their respective rights; that the reasonable value of the use and enjoyment of the land by said *John C. Arnold* be assessed and determined, and that said *John C. Arnold* be compelled to pay reasonable rental for the use and occupation; that judgment therefor be rendered against *John C. Arnold* in favor of the other parties as their rights may appear; and for general relief.

The defendant *John C. Arnold* answered admitting that Agnes Arnold, formerly Wiesner, died intestate on or about the 18th day of March, 1907, and at the time of her death was the owner in fee of the real property described in the complaint; that Agnes Arnold left her surviving *John C. Arnold,* her husband, Charles Strellmann, Jacob Scheiner, William Wiesner, and Harry Wiesner, her sons, and that one Joseph Scheiner was also a son of said Agnes Arnold, deceased, but that defendant had no knowledge as to the death of Joseph Scheiner prior to the death of said Agnes Arnold, therefore denies the same; also admits that

Agnes Arnold never had any children by defendant *John C. Arnold;* admits that on the 21st day of March, 1908, William Wiesner and Harry Wiesner conveyed to defendant *John C. Arnold* an undivided one-half of their interest in the premises described in the complaint; admits that Emma Strellmann is the wife of Charles Strellmann; that Amelia Scheiner is the wife of Jacob Scheiner, and Julia Arnold the wife of defendant *John C. Arnold;* and that since March 18, 1908, he has occupied the premises described in the complaint, and denies the allegations in the complaint not specifically admitted. The answering defendant, *John C. Arnold,* sets up a counterclaim as follows:

"For a further and separate answer to said plaintiffs' complaint, and by way of counterclaim, the defendant *John C. Arnold* shows and affirmatively alleges each and every fact hereinbefore admitted in his answer. This defendant further shows that the deceased Agnes Arnold, formerly Wiesner, became the owner and was in possession of the real estate described in the complaint in this action, and remained in possession until about the 18th day of March, 1908, when she died. The defendant further alleges and shows that he and said Agnes Arnold intermarried at Milwaukee, Wisconsin, on the 9th day of March, A. D. 1893, and as husband and wife lived on the premises described in the complaint herein, and that this defendant, during the occupancy of said property by himself and Agnes Arnold, his wife, engaged in and conducted a gardener and florist business and made certain improvements and additions on said premises, under the impression that he and his wife, the said Agnes Arnold, were joint owners of said premises, and during all of said years has paid all taxes and assessments levied on said property; that said Agnes Arnold, before her marriage with this defendant, to wit, on the 23d day of May, 1891, executed a mortgage of $2,176 on said property, and that ever since his marriage with said Agnes Arnold this defendant has paid the interest on said mortgage, and on the 11th day of June, A. D. 1907, paid said mortgage in full to the mortgagee; that said improvements, additions, and other expenditures were made during the lifetime of said Agnes Arnold, and amounted to

the sum of about thirteen thousand five hundred ($13,500) dollars, which amount this defendant advanced and paid; that by reason of the making of said improvements and additions by this defendant the said premises described in the complaint and herein referred to have been enhanced in value, greatly in excess of the amount advanced and expended by this defendant in making said improvements and additions; that said Agnes Arnold, deceased, did not contribute to the expenditures made by this defendant as aforesaid in any manner, and that said entire amount was advanced and paid by this defendant out of his own earnings and means; and that in justice and equity the said amount so expended should be declared a lien upon the right, title, and interests of the plaintiffs in proportion to their interest in the estate, and allowed to this defendant out of the proceeds of the sale of the premises in the complaint described, if the same be sold, together with his costs and expenses."

The plaintiffs and each of them demurred to the counterclaim for the following reasons: (1) For want of facts sufficient to constitute a cause of action; (2) because the cause of action sought to be stated is not pleadable as a counterclaim. The court sustained the demurrer and allowed the defendant to amend within twenty days upon payment of $10 costs. The defendant *John C. Arnold* appealed from the order.

The cause was submitted for the appellant on the brief of *Julius E. Roehr,* attorney, and *C. Steinmetz, Jr.,* of counsel, and for the respondents on that of *Henry E. Foelske.*

KERWIN, J. Two grounds of demurrer are stated: (1) Want of facts sufficient to constitute a cause of action; and (2) that the alleged counterclaim is not pleadable as a counterclaim. Referring first to the latter ground, the majority of the members of the court are of opinion that if sufficient facts were stated showing that the defendant *John C. Arnold* was entitled to relief by virtue of a claim as tenant in common, such counterclaim could be pleaded in the action. *Ward v. Ward's Heirs,* 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 456, and note. But the court is of opinion that the

demurrer was properly sustained for want of facts sufficient to constitute a cause of action. As will be seen from an examination of the counterclaim set up in the statement of facts, it is based upon a claim made by the defendant *John C. Arnold* to the effect that during the time that he and Agnes Arnold were husband and wife they lived upon the premises and conducted a business thereon, and that he made certain improvements on the real estate, the title to which was in his wife, and that said defendant was under the impression that he and his wife were joint owners of the property, and that he paid the taxes and paid off a mortgage on the property, and that such expenditures were made during the life of said Agnes, his wife, and that the premises were greatly enhanced by said defendant *John C. Arnold* in excess of the amounts paid and expended thereon by him. The claim of said defendant, therefore, is based upon the fact that he paid off a lien and expended other moneys for the benefit of his wife's property during her life and supposed he was a joint owner. These alleged facts constitute no claim, legal or equitable, against the real estate in question. Money expended by a husband upon his wife's real estate is presumed to be expended for her benefit. 21 Cyc. 1426; 14 Am. & Eng. Ency. of Law (1st ed.) 579, 625; *Selover v. Selover,* 62 N. J. Eq. 761, 48 Atl. 522; *Wright v. Hood,* 49 Wis. 235, 5 N. W. 488; *Clark v. North,* 131 Wis. 599, 111 N. W. 681. Nor does the alleged fact that said defendant was under the impression that he was a joint owner raise any right, legal or equitable, in his favor and against the property of his former wife. So, too, the mere fact that he paid off a mortgage on the property creates no right in his favor in the real estate. No facts are pleaded in any way tending to show that by agreement or otherwise the said defendant was to be reimbursed for any moneys expended; nor are any facts alleged tending to show that he was to be subrogated to the rights of the mortgagee under the mortgage which it is alleged he paid.

Many cases are cited by appellant involving the rights of

parties in partition suits, but such cases are not applicable here, because during the life of Agnes Arnold said defendant had no interest, legal or equitable, in her property under the allegations of the counterclaim; therefore the counterclaim states no cause of action. It follows that the order sustaining the demurrer must be affirmed.

By the Court.—It is so ordered.

KRACZEK, Respondent, vs. THE FALK COMPANY, Appellant.

April 5—April 26, 1910.

Master and servant: Injury to servant: Negligence of fellow-servant: Assumption of risk: Evidence: Weight: Unsupported verdict: Omitted facts: Appeal: Presumptions.

1. The positive testimony of two witnesses that the tipping of the heavy cope of a flask in defendant's foundry by which plaintiff was injured was caused by the hook of a chain catching under the flange of the cope is *held* to establish that fact, contrary to a finding of the jury supported only by plaintiff's testimony to the effect that the hook was either hooked in the handle of the cope or caught in the flange, and that he did not know which.
2. That the accident was proximately caused by negligence of a fellow-servant of plaintiff in handling the chain which he had just unhooked from the cope, after the cope had been moved by a crane, is also *held* to be established by the evidence, contrary to a finding of the jury.
3. Where the negligence, if any, of a master which caused injury to a servant consisted in a failure to promulgate a rule requiring a signal to be given before the moving of a crane, in the operation of which the servant was engaged with others, but it appeared that, although the servant knew that the crane was customarily moved without any signal, he had continued in the work without any protest for several months prior to the injury, the servant must be deemed to have assumed the risk of injury resulting from the moving of the crane without signal.
4. The mere fact that the article being handled by the crane at the time of the injury, though of the same sort, was larger and

heavier than those which the servant had before assisted in moving, did not so change the character of his employment that it should be held that he did not assume the risk.

5. Under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), it will not be assumed in support of a judgment that a fact not found by the jury was found by the trial court, where there is no evidence which would have warranted such a finding.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

Action for damages for personal injury. The plaintiff was employed as a chainman in defendant's foundry, and had been so employed for five or six months before he was injured. There were a number of cranes used in the foundry that were operated by electricity and that ran on tracks above the floor upon which the work of molding was carried on. These cranes were used to convey buckets containing molten metal from one part of the factory to another and to convey the empty buckets after the iron was poured into the molds or flasks, and also to move the "flasks," "copes," and "drags" from place to place. The top part of a mold or flask is called a "cope" and the bottom part the "drag." The hoisting cable was fastened to a stationary shieve at the top and ran through to a lower shieve, which hoisted up and down with the cable. At the bottom of the lower shieve there was a hook to which four chains were attached, each having a hook at the lower end. The copes had four handles attached thereto, into which the hooks were inserted when it was desired to elevate or move them. The crew appears to have consisted of six men: the craneman who operated the crane, the molder, who appears to be the party under whose supervision operations were carried on, and four chainmen, whose work consisted in following the crane and hooking the chains into objects that were to be moved and unhooking the chains when the movement was made. On the day of the accident a large cope twelve feet in length by ten feet in width and weighing about nine tons had been re-

moved from a mold and set upon supports about four or four and one-half feet from the floor. It was not convenient for the plaintiff to handle his chain from the position in which he was when the cope was put in place, and the molder in charge of the work attended to one of the chains in his stead. After the chains were unhooked from the handles the craneman started to move his crane away and one of the chains caught on the flange of the cope and tipped the same off its support so that it struck the plaintiff and broke both of his legs.

Numerous acts of negligence on the part of the defendant were alleged in the complaint. But one was submitted to the jury for consideration, the court evidently being of the opinion that the evidence did not warrant the submission of any other. Such negligence consisted in the failure of the defendant to promulgate proper rules governing the movement of cranes, to the end that the same might not be moved without some proper signal or warning. The name of the chainman who had charge of the chain that caused the cope to tip over was George White, and he was stationed at the southwest corner of the cope.

The jury found (1) that the defendant negligently failed to promulgate proper rules and regulations for the operation of the crane, by the movement of which the plaintiff was injured; (2) that the failure to promulgate such rules was the proximate cause of the plaintiff's injury; (3) that the cope was not caused to tip by reason of the hook of the chain at the southwest corner of the cope catching under the upper flange of the cope; (4) that the molder, George White, did not handle his hook in a negligent manner; (5) that the plaintiff was not guilty of contributory negligence; (6) that the plaintiff was damaged in the sum of $5,500. From a judgment entered on such verdict the defendant appeals.

For the appellant there was a brief by *Doe & Ballhorn*, and oral argument by *J. B. Doe*.

For the respondent there was a brief by *W. H. Timlin, Jr.*, attorney, and *Glicksman, Gold & Corrigan,* of counsel, and oral argument by *W. L. Gold* and *Mr. Timlin.*

BARNES, J. The third and fourth findings made by the jury are contrary to the direct and positive evidence of at least two witnesses and are not supported by any evidence whatever. It is true that the plaintiff, after testifying two or three times that he did not know whether the hook at the southwest corner of the cope was caught in the handle or whether it had been removed therefrom and caught on the flange of the cope after the crane started to move, did say on redirect examination that the hook was caught in the handle. On recross-examination he explained his apparently inconsistent statements by saying that what he meant was that the hook was either hooked in the handle or caught under the flange, and that he did not know which. Clearly, this evidence raised no issue as against that of the chainman, George White, who had hold of the chain and who testified positively that the hook had been removed from the handle and tipped the cope over by catching on the flange. The craneman corroborated White's evidence. The evidence is just as conclusive that White was negligent in permitting his hook to come in contact with the flange. The only duty the chainman had was to follow the crane and hook the chains into objects that were to be moved, and unhook them when the movement was made. In reference to this matter the plaintiff testified:

"The chainman's duties consist in making hitches for the crane; that is, in hitching the hooks of these four chains or any other chains that the crane carried, and unhitching. That is substantially all the chainman has to do; that is what is called in the foundry to follow the crane. And that was my work. . . . I knew, and everybody else knew, the chains had got to be kept away or held away from the cope when the cope [crane?] was moved. . . . If the hooks were not held away from the cope they would come right down against it—

of their own weight because they hung in the middle over it. . . . In handling those heavy copes and flasks it was part of the duty of the chainmen, of whom I was one, when the hooks were unhooked from the flask, to hold them away, and keep them away until the crane lifted them above the thing that was to be lifted or had been lifted. That is one thing the chainmen are for. . . . I knew enough to keep the chain away from anything. I knew, and any man who had experience in the handling of those molds knew, that it was the business and duty of the men that unhitched the chains to keep them away from the cope, if it was a cope, until the hoist had cleared the weight. . . . It was the business of the chainman or anybody that was acting as chainman, in unhooking that cope or any similar weight that was lifted up, to hold the chains away until the crane would move clear. . . . A man could not very well work there without knowing that. . . . It was done every day a good many times."

George White, the chainman, whose chain caught in the flange of the cope and tipped it over, had been working in the foundry about five months before the accident happened, and testified substantially to the same effect although not with so much detail. No reason is given or shown why he did not perform his duty and keep the hook away from the cope until it cleared the flange. There is no evidence in the case that either qualifies or contradicts that detailed. The chainman White was a fellow-servant of the plaintiff. That the cause of the overturning of the cope was the negligence of White would seem to be conclusively established. That such negligence was the proximate cause of the injury would also seem to follow as a necessary legal inference.

But there is another conclusive reason why plaintiff cannot recover. He had worked in the foundry five or six months before the accident happened. The negligence which the jury found was imputable to the defendant was its failure to promulgate proper rules and regulations for the operation of the crane. The testimony to support this finding tended to show that it was the defendant's duty to promulgate a rule requiring a signal to be given before the crane was moved.

The plaintiff, according to his own evidence, knew that the crane was customarily moved without any signal. After testifying that he did not see or hear any one around the cope give a signal to the craneman on the morning of the accident, he said:

"So far as I know, there never was any signal given to him at all. I did not know of any rules in that shop. It looked strange that no signals were given. I thought so at the time. The reason I didn't say something about it was because they been always doing that, and it would not do me any good to make a complaint about it—one man. . . . They may have given signals to the craneman, but not that I saw. So that all the time I was there I never saw a molder give a signal to the craneman. That is true. I didn't hear a molder give a signal to the craneman about moving the crane. The molder did once in a while give a signal to the craneman—once in a great while. I heard it, but I don't know of any signals to be given. Once in a while I heard the molders signal to the craneman how to move. I don't know how many times in the six months. Sometimes when I was there I did not hear a signal for a day or two. I don't know how many times during the six months that I saw or heard a molder signal to the craneman what to do. Maybe a thousand times—for all my part it could be more, but not that I would know. Some days I seen them, and maybe I heard them, and some days I did not see any signals in there at all. Some days I worked all day and never heard or saw a molder give a signal to the craneman."

It would appear from this testimony that the plaintiff knew that, customarily, signals were not given, and that, with knowledge of this fact, he worked for several months without any protest. If the hazard of moving the crane without signals was one which he could assume, it seems clear that he did assume it, and that such a hazard may be assumed hardly admits of doubt. *Portance v. Lehigh Valley C. Co.* 101 Wis. 574, 581, 77 N. W. 875; *Bain v. N. P. R. Co.* 120 Wis. 412, 422, 98 N. W. 241; *Gierczak v. Northwestern F. Co., ante,* p. 207, 125 N. W. 436.

Counsel for the respondent seek to avoid such a conclusion

by asserting that the character of the work that was being done when the accident happened was different from that at which the plaintiff had been employed before, and that therefore it should not be held that he assumed the hazard to which he was subjected on this particular occasion. In reference to this matter the plaintiff gave the only testimony that was offered. He said:

"Most of the time I had been there I had been a chainman following the crane. That was about six months. I had seen handled copes like these or parts of heavy glass hundreds of times during that six months, and have taken part in it as a chainman a good many times—almost daily. . . . I did not work around large molds like the one we are talking about. That is when I was working on little stuff. As much as I remember, that was the only time that I ever handled a big mold like that—a big cope—otherwise I always handled more small stuff. I never worked around a big cope before in that shop. Before that day the largest cope or flask that was lifted that I worked upon as a chainman was maybe three feet wide or four feet long or so. That was lifted by the crane. I was not there when there was a big cope lifted. I say I never was near a big cope like that. I was always in the place where it was poured off. When I was acting as a chainman it was only for the purpose of hitching and unhitching chains. When I hitched or unhitched a chain on a flask or cope it was for the purpose of raising or lowering it. I have done that before the day I was hurt in that foundry. I had done it a great many times, hitched on the chains to copes or parts of flasks for the crane to lift. I hadn't done chain work before with the molds. That was the first time I ever acted as a chainman on a mold."

The sum and substance of this testimony is that, while he had assisted in the operation of moving copes by means of a crane a great many times, he had never before assisted in moving a cope as large as the one in question. There is no intimation that the movement was conducted in any different manner, or that there was any more danger to be apprehended from moving the large cope than there would be in

moving a smaller one, except that if the large cope were tipped over its weight in falling would be greater than a smaller one and therefore it might produce a more serious injury. But plaintiff had assisted in handling copes three feet wide and four feet long, or such a matter, that were moved by the traveling cranes. It is manifest that the result of tipping such a cope or mold on an employee would be serious, and that the mere fact that the one which was being handled at the time of the accident was larger and heavier than those at which the plaintiff had usually worked did not materially change his situation.

It is suggested that there was evidence tending to show that the crane was not only operated by an unskilled workman, but also by one whose sight was defective, and that we must assume, in support of the judgment, that the court found the defendant negligent in permitting one of its cranes to be operated by such an employee, and also that such negligence was the proximate cause of the injury. Sec. 2858*m*, Stats. (Laws of 1907, ch. 346). An examination of the record convinces us that the evidence fails to show that the defendant was negligent in this regard, and we entertain no doubt that the reason the court did not submit a question to the jury covering such alleged negligence was because it was satisfied that there was no evidence in the case warranting such a submission.

It is unnecessary to consider the other errors assigned. The court should have granted the motion of the defendant to change the answer to certain questions in the special verdict and for judgment on the verdict as corrected.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

TIMLIN, J., took no part.

SCHUSTER and another, Respondents, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY and another, Appellants.

April 5—April 26, 1910.

Equity: Laches: Estoppel: Injunction: Street railways: Unlawful running of interurban cars on city railway: Acquiescence of landowners: When compensation awarded in lieu of injunction.

1. Mere delay for a period of time less than that fixed by the statute of limitations governing the particular case, where the opposing party has not been prejudiced by that delay, is not laches.
2. Acquiescence by the owners of city lots for about nine years in the running of interurban cars upon the tracks of a city railway in front of their lots did not estop them from obtaining relief by injunction against such unlawful taking of their property, where during most of such time they and both railway companies supposed that the running of such interurban cars was lawful, and neither company had made material improvements or expended any considerable amount of money upon faith of acquiescence, and where the frequency, size, and speed of the interurban trains passing the premises had increased from time to time, causing substantial damage and depreciation in the value of the land.
3. When land is being taken by a railway company for public use without compensation in cases not covered by the statutes, the landowner is entitled as a matter of right, and not as a mere matter of grace, to an injunction restraining such taking.
4. Where the landowner has been guilty of laches, a court of equity has power in some cases to decree compensation in lieu of the injunction, particularly where his damages are comparatively small and those of the other party great, and where public interests would be injuriously affected by the injunction.
5. This rule of equity is limited as above, and also to cases in which the illegality of the defendant's act consists only in taking or damaging the plaintiff's property without compensation, and cannot be applied where, after such compensation is made, the act sought to be done on condition of making compensation is still contrary to law.

APPEAL from a judgment of the circuit court for Milwaukee county: A. H. REID, Judge. *Affirmed.*

For the appellants there was a brief by *Miller, Mack & Fairchild,* and oral argument by *A. T. Fairchild* and *Geo. P. Miller.*

Roger M. Trump and *George D. Van Dyke,* of counsel, for the respondents.

TIMLIN, J. With commendable and lawyerlike precision the argument of appellants' counsel starts out with this proposition: "The one question involved is the character of relief to which respondents are entitled. That they are entitled to relief either in this action or at law is not denied." The premises may be stated as follows: Each of the plaintiffs owns a separate piece of land abutting on the south side of Wells street in the city of Milwaukee, which under the laws of this state extends to the center of the street, and that part underlying the street is subject to the public easement for travel and other ordinary street purposes, including the maintenance and operation of a street railway thereon, but is not subject to the additional burden of an interurban railway or cars thereon. On each of these pieces of land is a large and costly dwelling occupied by the owner of that piece. The *Milwaukee Electric Railway & Light Company* is a street railway corporation, lawfully maintaining its tracks, wires, and poles in Wells street and overlying the lands of plaintiffs in the street, and it maintains and is operating street cars thereon for the carriage of passengers, and propelled by electricity. The *Milwaukee Light, Heat & Traction Company* is an interurban railway company, having its easterly or nearer terminus outside of the city limits of Milwaukee, and its further or westerly terminus at Watertown, Wisconsin. It is engaged in the transportation of interurban passengers, and operates at present between Milwaukee and Watertown and the intermediate stations. The roadbed, rails, wires, and poles of both corporations are continuous, and no physical peculiarities in this respect mark the place

where the property of the first corporation ends and that of the second begins. The cars of the interurban company are larger and heavier than the street railway cars, are usually run at greater speed, and are sometimes in trains of two or more cars, and are furnished with closets for the accommodation of passengers. By contract with the street railway company the interurban company runs its cars down Wells street and over the lands of plaintiffs, which are subject to the said street easement, and has been so doing since September, 1899, which was less than ten years prior to the commencement of this action. These interurban cars do not, like the street cars, stop at street crossings upon signal for the reception and discharge of passengers after they enter the city, but stop only between the city limits and a downtown passenger station for the discharge of the interurban passengers who desire to alight at intermediate points. The interurban railway company has never received from the city of Milwaukee any permission or authority to operate interurban cars on Wells street, and the street railway company is limited by its franchise from the city to the operation of street railway cars.

The trial court found the plaintiff bound by no estoppel and barred by no laches, and enjoined defendants and each of them from maintaining or operating over or upon the premises of the plaintiffs, or over and upon Wells street in the vicinity of said premises, any interurban cars.

The appellants contend that the respondents have been guilty of such laches as to bar relief in equity and remand them to an action at law for damages, or at least of such laches as, considering the comparatively small damages to the plaintiffs and the great damage to defendants, and the loss and inconvenience to the public, to justify or require a court of equity to award compensation to the plaintiffs in lieu of an injunction. Legal conclusions involved in the foregoing concession of counsel and in the stated premises are sup-

ported by *La Crosse City R. Co. v. Higbee,* 107 Wis. 389, 83 N. W. 701; *Zehren v. Milwaukee E. R. & L. Co.* 99 Wis. 83, 74 N. W. 538; *Younkin v. Milwaukee L., H. & T. Co.* 120 Wis. 477, 98 N. W. 215; *Beloit, D. L. & J. R. Co. v. Macloon,* 136 Wis. 218, 116 N. W. 897, and other cases in this court.

The trial court found, in substance, that shortly before September, 1899, when the interurban cars began to run on Wells street, the interurban company expended about $137,000 in constructing a roadbed outside of the city and otherwise, but the respondents did not know of this expenditure or of the intention to run these interurban cars on the tracks of the street railway on Wells street until such use began; that since this use began there was no material improvement made and no considerable amount of money expended by either defendant on Wells street, except for current repairs or for ordinary street railway purposes, and no material improvements or material expenditure of money made by defendants upon the faith of any supposed acquiescence of the plaintiffs or either of them. Plaintiffs had, during a great part of this time, no actual knowledge of their legal rights with reference to the passage of these interurban cars, and the defendants during the same time also supposed they had a lawful right to do what is here sought to be enjoined. The size of the cars, the speed of the trains, and the frequency and size of interurban trains passing in front of plaintiffs' premises has increased from time to time, and it is found that this use of the street for interurban traffic on days when such traffic is heavy, which includes the summer time, causes dust, noise, vibration, and discomfort, thereby injuring plaintiffs in the use and enjoyment of their property and causing a depreciation in the market value of such property. There is no finding and no definite evidence fixing the amount in money of such damage or depreciation, but the court finds that the damage to the plaintiffs is substantial.

We agree with the court below that there is here shown no estoppel against the plaintiffs and no such laches as would absolutely bar them from all relief in equity, in a case where the legal remedy is inadequate and the plaintiffs seek by injunction to prevent an unlawful taking of their property.

However it may be elsewhere, it is settled in this state that:

"Mere delay is not a bar in equity, ordinarily, where it would not be a bar at law, and obviously it is not a bar where there is a statutory period covering the identical subject, short of such period. Angell, Lim. § 25; *Godden v. Kimmell,* 99 U. S. 201. To constitute a bar when the statute has not run, there must be delay, together with facts and circumstances occurring during such delay to the prejudice of innocent parties." *Kropp v. Kropp,* 97 Wis. 137, 145, 72 N. W. 381, 383.

"Mere delay within the statutory period for relief at law does not preclude a recovery in equity, and at most that is all which appears here. *Knowlton v. Walker,* 13 Wis. 264. If delay were shown, and in the meantime a change in the situation of the parties or the property, so that it would be unconscionable on that account to allow plaintiff at the late day to successfully assert his claim, the question would be different." *Ellis v. Southwestern L. Co.* 102 Wis. 400, 407, 78 N. W. 747, 749.

In a case where the delay had been for eighteen years, but the wrong constituted a periodically recurring nuisance, the objection of laches was upon these principles overruled (*Cedar Lake H. Co. v. Cedar Creek H. Co.* 79 Wis. 297, 48 N. W. 371); and in *Ludington v. Patton,* 111 Wis. 208, 245, 86 N. W. 571, 582, it was said in deciding this point: "Any mere delay short of the statutory period for commencing an action in equity does not bar the right involved." It must also be borne in mind that in this state a final injunction against the unconstitutional taking of private property, even for public purposes, without compensation, is not a matter of grace but a matter of right, except as otherwise provided by statute. An injunction against a railroad company

which had appropriated the land of another was at first expressly authorized (ch. 80, Laws of 1858; *Davis v. La C. & M. R. Co.* 12 Wis. 16), then forbidden by statute any time prior to the appraisal of damages by commissioners and unless their award remained unpaid (ch. 175, Laws of 1861; *Andrews v. Farmers' L. & T. Co.* 22 Wis. 288). This last legal condition was continued by ch. 119, Laws of 1872, and ch. 291, Laws of 1873, which are now in force as sec. 1852, Stats. (1898). These statutes, while depriving the landowner of the injunction as an initiatory remedy, conferred upon him the right, in all cases in which the railroad company possessed the power of eminent domain but had failed to exercise it, and had entered upon the land with the express or tacit consent or acquiescence of the landowner, to himself institute and carry on condemnation proceedings. But when the award was not paid or was invalid, or there was no consent or acquiescence by him, the landowner was entitled to an injunction *ex debito justitiæ,* as was said in *Bohlman v. G. B. & M. R. Co.* 40 Wis. 157; "as a matter of right," as was said in *McCord v. Eastern R. Co.* 136 Wis. 254, 116 N. W. 845. And see *Stolze v. M. & L. W. R. Co.* 104 Wis. 47, 80 N. W. 68, and cases cited in opinion. In all such cases the injunction is not absolute, but until the award is made or paid, as the case may be.

We are, however, here presented with a case where the street railway company has no power to acquire by condemnation the lands of the plaintiffs for the purpose of running interurban cars over them, and where the interurban company, although given by statute the power to condemn land for its railroad purposes in some cases, is without that power with reference to city streets upon which it has received no permission to operate its cars. Sec. 1863*a,* Stats. (Supp. 1906); ch. 580, Laws of 1907; *Beloit, D. L. & J. R. Co. v. Macloon,* 136 Wis. 218, 116 N. W. 897. Appellants therefore invoke the rule that equity will in certain cases refuse

an injunction upon condition that the defendant make full compensation to the plaintiff, and award an issue to ascertain the amount of such compensation. That there is in certain cases such an equitable jurisdiction cannot well be gainsaid, in view of the many decisions covering this subject. The grounds for the exercise of this jurisdiction are various, as in *Jackson v. Stevenson,* 156 Mass. 496, 31 N. E. 691, where an injunction was denied but the cause retained in equity for compensation, because it would be futile to relegate the plaintiff to his action at law, his right which he asserted being one solely cognizable in equity and not recognized by law at all. Or in *Charleston & W. C. R. Co. v. Hughes,* 105 Ga. 1, 30 S. E. 972, where the railway company had no power of condemnation; had entered lawfully into possession under one who was life tenant; its interest had expired; title devolved upon the plaintiff, who sought to bring ejectment for a fragment of the line of railroad, the taking of which would cut the line of railroad in two, destroy its continuity, hence its value, and hence prevent the discharge of the duty the railroad owed the public under its charter. The property of the road was in the hands of a receiver *in custodia legis,* and the plaintiff was obliged to apply to the court of equity for leave to bring ejectment against the receiver. It was held that such condition should be imposed upon plaintiff that he would be required to do equity, which, in the view of the court, was to submit to the awarding of an issue to determine his compensation, and that a writ of possession in plaintiff's favor only issue in case the compensation so ascertained remained unpaid.

In other cases where one suffers special damage from a public nuisance and seeks in equity its abatement, if there has been laches on the part of the plaintiff, and the damage to the plaintiff is slight compared with the loss which will fall upon the defendant from the injunction, and the al-

leged nuisance is not unlawful *per se,* but only by reason of the manner in which it is conducted or maintained, the court denies the injunction and relegates the plaintiff to his remedy at law, or retains the cause in equity and awards compensation in lieu of the injunction sought. *Crosby v. Smith,* 19 Wis. 449; *Cobb v. Smith,* 23 Wis. 261 (this subject is regulated by statute); *McDougald v. New Richmond R. M. Co.* 125 Wis. 121, 131, 103 N. W. 244; *Ballentine v. Webb,* 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321.

The cases involving the right of a landowner to enjoin the unlawful operation of a railroad in the street in front of his land have sometimes been considered as coming within the law relative to a public nuisance causing damage to the person in front of whose premises the road is operated and who thereby sustains some special injury. This is noticeable in those states in which the title to the streets is vested in the city, and not a mere easement, as in this state. But it may be stated that suits in equity by a landowner to enjoin the wrongful operation of a railroad upon his land form a class by themselves, and in cases not reached by our railroad statutes, if it appears that there has been laches or delay on the part of the landowner in seeking injunction, and the effect of the restraining order would be to sever and destroy existing property of the railroad company and prevent it from carrying out the charter duties it owes the public, and the damages to the landowner are comparatively small, and the operation of the railroad is not illegal except in so far as the damage it causes plaintiff, then the court will, by reason of the plaintiff's laches and the consequence of enforcing his demand, either close its doors to the plaintiff and relegate him to his legal remedy where he has one, or retain the cause in equity for compensation in lieu of an injunction. When and under what rules the court will adopt the latter course instead of the former does not appear to be very well settled. We need

not determine that question in this case. See, however, *New York City v. Pine,* 185 U. S. 93, 22 Sup. Ct. 592; *Penrhyn S. Co. v. Granville E. L. & P. Co.* 181 N. Y. 80, 73 N. E. 566; *Penn Mut. L. Ins. Co. v. Austin,* 168 U. S. 685, 18 Sup. Ct. 223; *Knoth v. Manhattan R. Co.* 187 N. Y. 243, 79 N. E. 1015; *Galway v. Met. E. R. Co.* 128 N. Y. 132, 28 N. E. 479. For, even if we assume that the laches which is not sufficient to defeat plaintiff in equity and relegate him to his action at law may still be sufficient to warrant the court in decreeing compensation, instead of an injunction, where the damages are grossly disproportionate, and that the instant case contains all the other elements requisite to warrant such action of the court, there are several insuperable and distinguishing considerations which forbid. In the first place the operation of the interurban cars on Wells street is unlawful, not only as against the plaintiffs, whose private rights are invaded, but as against the public. The interurban company is not carrying out, but violating, its charter duty to the public in so doing. Can a court of equity, in consideration of money paid to the plaintiffs in satisfaction of their private wrongs, license the interurban company to do that which the law forbids? We think not. *Broadbent v. Imperial G. Co.* 7 De G., M. & G. 436; *Hennessy v. Carmony,* 50 N. J. Eq. 616, 25 Atl. 374; *Swinhart v. St. L. & S. R. Co.* 207 Mo. 423, 105 S. W. 1043; *Pennsylvania R. R. v. Montgomery Co. P. R.* 167 Pa. St. 62, 31 Atl. 468.

"As to the principle invoked, that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act complained of is in itself, as well as in its incidents, tortious. In such case it cannot be said that injury would result from an injunction, for no man can complain that he is injured by being prevented from doing to the hurt of another that which he has no right to do. Nor can it make the slightest difference that the plaintiff's property is of insignificant value to him as compared with

the advantages that would accrue to the defendants from its occupation." *Sullivan v. Jones & L. S. Co.* 208 Pa. St. 540, 555, 57 Atl. 1065, 1071.

When a continuous line of railway is sought to be severed by injunction, and continuity is an essential element of value as well as a necessity for carrying out the legal duty of the railroad to the public, and the operation of the road is lawful except as regards the private wrong to the plaintiff, a different case is presented than where, as in the case at bar, the railroad is seeking to acquire, in violation of the rights of the plaintiffs and in disregard of its public duty, property beyond the terminus of its authorized line. None of the property of the appellant interurban railway company will be destroyed by the injunctional decree appealed from; none of its duties to the public impaired by the enforcement of this decree. It will merely be restrained within its legal powers, and the public will continue to possess and enjoy all that was ever granted to or expected of the interurban company. The only loss or damage to the defendants will be the loss of profits which may follow from a cessation of their illegal acts and a return to the methods of transportation contemplated by public law, and the only inconvenience the public can suffer will be the inconvenience of observing the law of this state. If public convenience requires the operation of interurban cars on Wells street, the law points out a way in which the public, through its authorized representatives, may acquire this right. The contract between the appellants is, like the similar contracts in *Erie v. Erie T. Co.* 222 Pa. St. 43, 70 Atl. 904, and *Aurora v. Elgin, A. & S. T. Co.* 227 Ill. 485, 81 N. E. 544, 118 Am. St. Rep. 284, invalid. It confers no right upon either party thereto to use or aid in using the tracks of the street railway company on Wells street for the transportation of interurban cars or for doing anything other than a street railway business. The interurban travelers, like other passengers, must seek their various destina-

tions in the city of Milwaukee as passengers alighting from the termini or stations of steam railroads do by the usual conveniences, and this can be considered no public inconvenience.

Another cognate difficulty in the way of awarding compensation in lieu of an injunction is inherent in the situation presented. In order to apply this rule it is necessary that all damages to accrue to the plaintiffs from the perpetual operation of the interurban cars on the street in front of their premises be ascertained and fixed, and upon payment of this sum the defendants have the corresponding right purchased by such payment. Any other disposition of the case must result in merely the ascertainment of past damages up to the time of trial, and throws the plaintiffs back upon the necessity of bringing numerous actions to recover for the subsequent damages as fast as they accrue—the very thing they were allowed to come into equity to avoid. But the assessment of all damages to accrue from the perpetual operation of the interurban cars, and requiring their payment in lieu of an injunction, would be in legal effect to authorize, as against the plaintiffs, the operation of interurban cars upon this street without consent of the lawfully constituted authorities, but with consent of the court. This cannot lawfully be done.

By the Court.—Judgment affirmed.

HUEBL, by guardian *ad litem*, Respondent, vs. SCOLLARD and another, Appellants.

April 5—April 26, 1910.

Costs: Guardians ad litem.

1. The right to costs does not accrue until judgment, and until that time they may be abolished or changed in amount by statute.
2. Unless made liable by special direction of the court under sec. 2932, Stats. (Laws of 1907, ch. 325), a guardian *ad litem* is not responsible for costs adjudged against his ward after the repeal of sec. 2931, Stats. (1898), by said act of 1907, even though the action was commenced prior to such repeal.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

J. A. Eggen, for the appellants.

For the respondent the cause was submitted on the brief of *F. C. Eschweiler.*

WINSLOW, C. J. There is no necessity for a detailed statement of facts of the case. The question presented is this: Can the guardian *ad litem* of an infant plaintiff be punished for contempt because he fails to pay a judgment for costs rendered against his ward in April, 1909, in an action commenced in December, 1902? It is plain that this question must be answered in the negative. At the time the judgment was rendered there was no statute making the guardian *ad litem* liable for such costs, unless the court should specially direct him to pay them on account of mismanagement or bad faith in the action. Sec. 2932, Stats. (1898), as amended by ch. 325, Laws of 1907. It is true that at the time the action was commenced sec. 2931, Stats. (1898), provided that a guardian *ad litem* of an infant plaintiff should be responsible for costs adjudged against his ward and that payment might be enforced by attachment, but this

section was repealed *in toto* by ch. 325, Laws of 1907. No rights were saved by the repealing act, and there is no vested right in costs. The right to them does not accrue until judgment. Until that time they may be abolished or changed in amount by statute. *Two Rivers Mfg. Co. v. Beyer,* 74 Wis. 210, 220, 42 N. W. 232.

The court below so held, and hence the order refusing to punish for contempt must be affirmed.

By the Court.—It is so ordered.

NEACY, Respondent, vs. CITY OF MILWAUKEE and others, Appellants.

April 6—April 26, 1910.

Municipal corporations: Bonds for lighting plant: Approval by electors: Amount: Ambiguous proposition: Restraining issuance.

1. The power of a city of the first class to issue bonds for a municipal lighting plant is conditioned upon the general approval of such issue by the electorate, provided for in sec. 943, Stats. (1898), and a proposition for the issue of bonds under that section must by reasonable intendment include the amount thereof, or at least the maximum amount which is to be approved by the electors.
2. In cities of the first class, bonds for a municipal lighting plant can be issued only for the construction or purchase of the plant, there being no authority for their issuance to defray expenses of its maintenance.
3. A proposition to issue bonds for $500,000 "to erect *and maintain*" a municipal lighting plant, approved by the electors in a city of the first class after the city engineer had made a report that a plant could be erected for $250,000, is so ambiguous that it cannot be said with reasonable certainty that the electors authorized the issue of bonds to any specific amount for the *construction alone* of the plant, nor can it be said that they were not induced to vote in favor of such issue by reason of their approval of the issue of the bonds for purposes of maintenance. The issuance of any part of such bonds is therefore unauthorized and may be enjoined.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Suit in equity by plaintiff as taxpayer, on behalf of himself and others, to enjoin the defendants from entering into contract for the erection or purchase of any municipal lighting plant, or any part thereof, or machinery therefor; from paying anything upon any such contract; and from executing or issuing certain bonds therefor under a resolution of the common council. The complaint alleged that in 1904 the council, having amongst other information the report of the city engineer that a municipal lighting plant of the capacity of 2,500 arc lamps could be erected on what is known as Jones Island, property belonging to the city, for $250,000, passed a resolution in favor of erecting and maintaining a municipal electric light plant at a cost of $500,000. They caused to be submitted, at a special election, the question, "Shall $500,000 municipal electric light bonds be issued to erect and maintain a municipal electric light plant?" in favor of which a majority of votes were cast in the month of April, 1904; that after various investigations and advice the common council decided to buy a site elsewhere and caused to be issued $150,000 of said bonds, buying and paying for the site and leaving about $83,000 of the proceeds in the treasury. On March 4, 1907, the council passed another ordinance authorizing the issue of a further $150,000 of said bonds for the erection of a municipal electric lighting plant of the capacity of 1,000 arc lights of 2,000 candle power. In October, 1908, a resolution was adopted authorizing the board of public works to contract for the machinery and equipment for such a plant, together with a suitable building for the same. The complaint also contained various allegations as to the nonnecessity and impolicy of erecting such plant. A preliminary injunctional order was issued upon the complaint, and a motion to vacate the same was made by the defendants, setting out more fully council proceedings

and the proposed contract. The circuit court made an order denying the motion to vacate the restraining order, from which the defendants bring this appeal.

For the appellants there was a brief by *John T. Kelly,* city attorney, and *Benjamin Poss,* special assistant city attorney, and oral argument by *Mr. Poss.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Wm. C. Quarles,* of counsel, and oral argument by *Wm. C. Quarles.* As to the meaning of the word "maintain," they cited *Moorehead v. Little Miami R. Co.* 17 Ohio, 340; *Central R. Co. v. Collins,* 40 Ga. 582, 624; *Merrill v. Spencer,* 14 Utah, 273; *Rhodes v. Mummery,* 48 Ind. 216; *Hook v. W. & N. R. Co.* 58 N. H. 251.

DODGE, J. It being conceded by the answer that all of the proposed proceedings toward erecting and paying for a municipal lighting plant are taken in reliance upon the ability of the city to issue its bonds for the cost thereof by authority of the referendum vote of 1904 and are dependent upon such issue of bonds, the first and fundamental question is whether that vote is sufficient in law to authorize the present threatened issue of $150,000 of bonds.

Whatever power the city, acting through its common council and other officials, may have to engage in undertakings of the character here considered to be paid for out of the current revenues, the power to do so by the issue of bonds, thereby casting the expense upon the future, is conditioned upon at least general approval by the electorate. Sec. 943, Stats. (1898). While that section is not specific upon the subject, we deem it clear that a proposition for the issue of bonds for a specific purpose must, by reasonable intendment, include the amount thereof, or at least the maximum amount which is to be approved by the electors. Another limitation, at least by implication, found in the charter of cities of the first class is that such bonds, even when approved by the electors, can

only be issued and the proceeds used for the construction or purchase of an electric or gas light plant. No authority exists for issuing bonds to defray the expense of up-keep, repair, or operation. The only proposition which has been submitted to the voters is for the issue of $500,000 of bonds for the construction *and maintenance* of such plant. Does an affirmative answer to that question confer authority to issue $500,000 of bonds, or any less amount, for the construction alone? Probably if it does by fair construction, the reference to *maintenance* might be ignored as mere surplusage and futile. While all reasonable intendments should be indulged in favor of municipal action, nevertheless the policy of the statute is clear to require approval in advance by the electorate of any issue of bonds, and if the submission of that question be so involved and ambiguous that it cannot be reasonably ascertained that the will of the voters has been expressed in favor of the specific project and of the amount of bonds to be issued, the purpose of the statute will be thwarted if, nevertheless, they could be issued by the common council.

After mature consideration we are persuaded that a declaration in favor of the issue and use of $500,000 of bonds for the construction and maintenance of a plant does not with sufficient clearness declare that that amount, or indeed any specific part of it, may be expended in the construction alone. A voter with this question before him, accompanied by knowledge of the report of the city engineer that a plant could be constructed for $250,000, might well understand that the scheme was to provide this $500,000 not alone for the construction, but also for a fund to be expended in repairs and up-keep, or even in meeting the expenses of operation or such part thereof as might exceed annual appropriations. Municipal lighting plants have very much of the experimental both in mechanics and finance, and the early years after their construction may very possibly be fraught with unforeseen

expenditures and deficits. A voter might well believe that the proposition for which he voted included those things, and might well be in favor of postponing to future taxpayers the burden of defraying those experimental expenses rather than enhancing his own present taxes thereby. He might well assume that no more than the estimate of the city engineer would be required for the construction, and yet desire to provide a fund to meet the contingency suggested. Indeed, the very consideration that such expenses of the experiment might be postponed to the future may well have been an inducement to an elector to favor the construction of the plant. Such considerations as these, namely, the possible or probable effect of improper matter submitted in the same proposition tending to influence the voter in determining his choice upon the material matter, were held to invalidate in *State ex rel. Williams v. Sawyer Co.* 140 Wis. 634, 640, 123 N. W. 248, where several illustrative decisions were cited, to which may be added *Elyria G. & W. Co. v. Elyria,* 57 Ohio St. 374, 49 N. E. 335; *Farmers' L. & T. Co. v. Sioux Falls,* 131 Fed. 890; *Leavenworth v. Wilson,* 69 Kan. 74, 76 Pac. 400.

We are persuaded that it is impossible to say with reasonable certainty that the voters have authorized the issue of bonds to any specific amount for the construction alone of a municipal lighting plant, nor that they may not have been induced to vote in favor of the policy by reason of their approval of the use of the bonds for the purposes of maintenance. We conclude, therefore, that the record discloses an attempt by the city council to issue bonds and take the other steps in dependence thereon without the essential statutory prerequisite of a popular vote of approval, and that all such proceedings would therefore be illegal and would result in the subjection of the taxpayers of the city to at least an ostensible burden. From this, of course, results the conclusion that a temporary stay was proper, and the order appealed from refusing to vacate such stay was without error.

By the Court.—Order affirmed.

POZORSKI, Appellant, vs. GOLD RANGE COMMONWEALTH CORPORATION and another, imp., Respondents.

April 6—April 26, 1910.

Contracts: Validity: Corporations: Sale of bonds.

1. Contracts in violation of the common law or statutes are void and cannot be made the foundation for the enforcement of a legal right.
2. A contract by which plaintiff was to sell the bonds of a corporation, receive the proceeds and expend them for its benefit, receive all the proceeds of the corporate business and retain for himself fifty per cent. thereof, as part compensation for his services in selling the bonds, until such fifty per cent. should equal the amount received from the sale of the bonds, and was to have a first lien on all the property of the corporation to secure payment to him of an amount equal to the proceeds of the bonds sold by him, in legal effect made plaintiff the owner of the proceeds of the bonds, with an obligation to advance the money to the corporation upon security for its repayment, and was in violation of sec. 1753, Stats. (1898), because under it the corporation would not actually receive seventy-five per cent. of the par value of the bonds in money, labor, or property.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This is an action to recover damages for the alleged breach of a contract. The parties of the first part to the contract are the defendant corporation, which is incorporated under the laws of Arizona, and the president and secretary thereof individually. The parties of the second part are the plaintiff and Fred S. Garland of Iowa. Mr. Garland has assigned his interest in the contract to the plaintiff.

The first paragraph of the contract makes certain representations as to the property owned by the corporation and as to the value thereof. The plaintiff alleges that these representations are false.

By the second paragraph the mining company agrees to

pay, in advance, the estimated expenses of the plaintiff and the expenses and fees of a mining engineer to be selected by the plaintiff for examining the corporation's mining claims and titles.

In the third paragraph the plaintiff agrees to make the examination, beginning this undertaking within one week after a sufficient amount to cover such expenses is paid, and to deliver to the corporation a report of the examination within two weeks after the examination. The plaintiff alleges that the corporation has breached the contract and refused to advance money for the expenses as was agreed under the contract.

By the fourth paragraph of the contract the plaintiff and his associate in the contract were given an option, for the period of sixty days after the date of the written report provided for in paragraph 3, "to sell for the said corporation $30,000 par value of its first mortgage ten-year gold bonds . . . of a total authorized issue of $150,000 secured by a first mortgage or trust deed on all of its property and in which *S. J. Pozorski* is to be named as trustee." The bonds, trust deed, and authority to issue were to be in such terms, manner, and form as their attorney approved, and the defendants agreed to have abstracts of title prepared showing good title and that the property was free from incumbrances. The defendants were to have the bonds and trust deed executed and "to send such $30,000 worth of such negotiable bonds to *S. J. Pozorski* at Milwaukee, Wisconsin, to be by the said second parties sold from time to time for par without interest." If the option should be exercised it was agreed that the corporation would, "in consideration of services already rendered and to be rendered at the time such option is exercised, deliver to *S. J. Pozorski* 300,000 shares of its stock of the par value of $1 each."

The plaintiff and his associate agreed to use their best efforts to sell the bonds. All money received from the sale

of the bonds was to be deposited with *S. J. Pozorski,* who was to be trustee "to hold and to receive the said moneys and to expend the same in purchasing and erecting machinery for a mill or to make other improvements, . . . or in paying off the said indebtedness of $10,000 hereinbefore referred to, or for such other purposes as he may think proper to make the said properties profitable, or to obtain patents from the United States government to said claims." For every $100 received by him from the sale of the bonds *S. J. Pozorski* was to have the privilege and right to deliver 1,000 shares of stock, and to have charge and control of any stamping mill or mills or other reduction works at which the ores from the property were to be treated. The agreement also provides that he is

"to have and receive all the proceeds or income from such mill or reduction works or from the sale of any ores or minerals mined from the said properties and to pay not more than fifty per cent. of all the gross proceeds therefrom for the benefit of the said corporation in expenses of mining or reducing ores or other proper expenses and to retain the other fifty per cent. of such proceeds of such sales until fifty per cent. so to be retained by him shall amount to the amount he has received from the proceeds of sale of the bonds hereinbefore referred to, which said fifty per cent. the parties of the second part herein are to have as their own as part compensation for services rendered in the sale of the said bonds. It is also agreed that the said *S. J. Pozorski* shall have a lien on all of the property of the said corporation, real and personal, prior to the lien of the said trust deed or mortgage hereinbefore referred to and prior to any other incumbrances on the said property to secure payment to the parties of the second part of an amount equal to the amount received by the said *S. J. Pozorski* as proceeds from the sale of any bonds which may be sold by the said parties of the second part."

The defendants agree not to issue bonds above a specified amount and for a specified purpose "without the consent and approval of the said *S. J. Pozorski,* and that the said corpora-

tion is not to make any further indebtedness of whatsoever kind or description without the consent of the said *S. J. Pozorski.*"

By the fifth paragraph of the contract each of the parties of the second part obtained a one-half interest in the profits arising out of the contract.

The trial court sustained the general demurrer of the defendant corporation and *C. D. Van Duzer,* on the ground that the face of the contract showed an illegal purpose; therefore the courts would not lend their aid to its enforcement. This is an appeal from the order of the court sustaining the demurrer.

For the appellant there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *Clifton Williams.*

For the respondents there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* of counsel, and oral argument by *Jackson B. Kemper.*

SIEBECKER, J. The plaintiff seeks recovery for the breach of this contract. It is alleged that the representations therein made concerning the ownership of the mining property, with stated improvements, that it was a corporation with a paid-up capital stock of the stated amount, and that its properties were free from indebtedness, were false; and that by reason of such false representations and defendants' failure to advance to plaintiff the money as agreed in the contract, for the purpose of paying the expenses of himself and a mining engineer to make examination of the mining property, plaintiff suffered damages by being prevented from earning the commission he was to receive for making sale of the corporate bonds and in using the avails thereof for constructing mills on this property under the terms and conditions of the written contract. The trial court sustained the defendants' demurrer to the complaint upon the ground that the material

parts of the agreement were fraudulent in their nature and against the public policy of the state, and that a court would not therefore lend its aid to enforce the contract.

It is well established that contracts in violation of the common law or the statutes are void, and that parties thereto will not be given the aid of courts to enforce claims arising thereunder, because the law does not permit that such a contract be made the foundation for the enforcement of a legal right. *Melchoir v. McCarty,* 31 Wis. 252; *Pearson v. Kelly,* 122 Wis. 660, 100 N. W. 1064.

The stipulations of this contract pertaining to the sale of the bonds of the corporation are that the plaintiff and his associate have the right on their part to sell the corporate bonds secured by a first mortgage or trust deed, in which plaintiff was to be the trustee, and that all the money realized from the sale of such bonds was to be received and held by the plaintiff as trustee. It was further agreed that the plaintiff was to purchase and erect machinery for a mill, to make such other improvements of the mining property, or to pay existing debts against the corporation, incurred in the acquisition of the property, as in his judgment he should deem proper for a profitable operation of the properties, or he might make such expenditures to obtain patents on the properties from the United States; and the plaintiff and his associate were to "have a lien on all of the property of the said corporation, real and personal, prior to the lien of the said trust deed or mortgage hereinbefore referred to and prior to any other incumbrances on the said property, to secure the payment to the parties of the second part of an amount equal to the amount received by the said *S. J. Pozorski* as proceeds from the sale of any bonds." This is an agreement by the corporation to pay plaintiff and his associate for their services an amount equal to the sum realized from the sale made by them of the corporate bonds, and that they should have such

a lien that they would be the first to be paid out of the proceeds of the bonds or out of the property into which the proceeds might have been converted. It is in effect an agreement to pay plaintiff and his associate out of the avails of the bonds sold and out of the company's other property an amount equal to the face value of such bonds. The effect of the contract is that the plaintiff obtains a first lien upon the proceeds of the bonds sold or the avails thereof, in machinery or other property, which would enable him to apply the money realized from the bonds to pay himself and associate for negotiating them and for investing the proceeds in machinery to operate this mine. In substance it is an arrangement by which plaintiff was to advance to the corporation money realized on its bonds and to be secured the repayment thereof as compensation for services rendered to the whole amount he has realized. In other words, plaintiff, as trustee, is in this circuitous manner made the owner of the funds received by him from the sale of bonds, and whatever part of such funds he should advance to the company would be secured by a first lien on all of the corporation's property. In legal effect, this treats him as the owner of the proceeds of the bonds, with an obligation to advance such sums as may be required for the equipment and operation of the mine, and in case the mine fails to produce sufficient to repay such sum he retains an interest in the property, acquired by the money he so advanced to the corporation, to make good to him the amount so advanced. Under these conditions the corporation does not actually receive the proceeds of the bonds, but only a conditional promise that it shall be paid such proceeds if plaintiff's undertaking to operate the mine shall produce an income sufficient to pay double the amount realized from the sale of the bonds, and in the event that the mine does not produce such an income the corporation never would receive the proceeds of the sale of the bonds. Under such circumstances the plaintiff would retain them under his claim of

lien provided in the contract. This violates sec. 1753, Stats. (1898), which provides:

"No corporation shall issue . . . any bonds or other evidence of indebtedness except for money, labor or property estimated at its true money value, actually received by it, equal to seventy-five per cent. of the par value thereof, and all . . . bonds issued contrary to the provisions of this section . . . shall be void."

We consider that the arrangements between the plaintiff and the corporation and the other defendants, as embodied in the contract before us, do not operate so that the corporation will actually receive seventy-five per cent. of the par value of the bonds in either money, labor, or property, as provided in this section of the statutes. The contract is therefore a violation of this statute and hence void. It contravenes the law and public policy of the state, and plaintiff cannot rely on it to enforce an alleged legal right. *Melchoir v. McCarty,* 31 Wis. 252, and decisions of this court wherein it is cited.

It is unnecessary to consider other grounds of alleged illegality of this contract which were suggested in argument, nor the question whether plaintiff's alleged damages are purely speculative and prospective losses such as are not recognized in the law.

By the Court.—The order appealed from is affirmed.

DRAKE, Respondent, vs. DRAKE, Appellant.

April 6—April 26, 1910.

Bills and notes: Payment: Burden of proof: Evidence: Authority of agent to receive payment: Husband and wife.

1. In an action upon a promissory note where the defense is payment the burden of proof is upon the defendant.
2. A receipt or release signed by one not shown to have had authority from the payee of a note is not competent evidence of payment.
3. The decision of the trial court that plaintiff's husband, to whom defendant claimed to have paid the note in suit, had no authority to receive such payment, is *held* to be supported by the evidence.

APPEAL from a judgment of the circuit court for Milwaukee county: OREEN T. WILLIAMS, Circuit Judge. *Affirmed.*

For the appellant there was a brief signed by *Frank M. Hoyt,* and oral argument by *W. D. Thompson.* They cited 31 Cyc. 1370; *Wheaton v. Trimble,* 145 Mass. 345; *Bartel v. Brown,* 104 Wis. 493, 80 N. W. 801; *Loizeaux v. Fremder,* 123 Wis. 193, 198, 101 N. W. 423; *Crane v. Gruenewald,* 120 N. Y. 274, 24 N. E. 456; *Brown v. La Crosse City G. L. & C. Co.* 21 Wis. 51; *Davenport v. Schram,* 9 Wis. 119; *Twohy M. Co. v. Estate of McDonald,* 108 Wis. 21, 22, 83 N. W. 1107.

For the respondent there was a brief by *Henry J. Killilea* and *Rodger M. Trump,* attorneys, and *Thomas H. Dorr,* of counsel, and oral argument by *Mr. Trump.* They cited, besides other authorities, *Winkelmann v. Brickert,* 102 Wis. 50, 78 N. W. 164; *Bautz v. Adams,* 131 Wis. 152, 111 N. W. 69; *Kohl v. Beach,* 107 Wis. 409, 83 N. W. 657; *Marling v. Nommensen,* 127 Wis. 363, 106 N. W. 844; *McIndoe v. Clarke,* 57 Wis. 165, 15 N. W. 17; *Meyer v. Hafemeister,* 119 Wis. 539, 97 N. W. 165.

TIMLIN, J. This action was brought on a promissory note for $1,500 dated October 10, 1899, signed by the defendant

and payable to the plaintiff. The defense was payment. When the case was on trial before the court and a jury and the testimony closed, each party moved for a directed verdict in her favor. Thereupon the court said: "I suppose it is substantially correct that this is a question of fact for the court, and that there is no question of fact to be submitted to the jury." To this both counsel assented. After adjournment and consideration of the evidence the court delivered an opinion to the effect that the note in question had been delivered to the plaintiff, that there was no evidence of the authority of Eden Drake, the plaintiff's husband, to whom it was claimed payment had been made, to act as the agent for the plaintiff in receiving such payment, and directed a verdict for the plaintiff.

The delivery to the plaintiff is established by the testimony of the plaintiff that the note was delivered to her, that she has it and produces it at the trial, and that she is the payee named in the note. This is neither contradicted nor objected to.

The plaintiff was the second wife of Eden Drake, defendant's son, and was married to him in 1886. They had a family of four children. Plaintiff's husband, Eden Drake, died September 10, 1908, and defendant's husband, his father, died February 21, 1908. Nine hundred dollars of the money loaned by the plaintiff to defendant was money of the plaintiff drawn by her out of the bank for that purpose, $200 otherwise furnished by her, and $400 contributed from her husband, making the $1,500. Plaintiff received the note from her husband and read it and handed it back to him, and either the husband or the plaintiff then put it in a safe in the house in which both kept private papers and to which both had access. Her husband was intrusted with the management of the plaintiff's affairs. In the spring of 1905 the plaintiff's husband was looking for the note, asked the plaintiff if she had seen it, and plaintiff also looked for it then, but could not find it. There was up to this time no

claim that the note had been paid. The plaintiff and her husband had a serious disagreement. Thereafter he went to Dakota and brought an action for divorce, which plaintiff defeated. In September, 1905, plaintiff found the note in this safe among some photographs and spoke to her husband about collecting it. Her husband said that he had collected it, and if plaintiff consented to an absolute divorce he would give her the equivalent of the proceeds of this note. Plaintiff then placed the note in the hands of an attorney for collection. The defendant is unable to testify that she ever paid the note. She produces a receipt signed by her son, plaintiff's husband, dated April 18, 1905, for $1,500 in full for a note given by her to E. W. Drake or to the plaintiff, *Anna B. Drake*. There is some suggestion that defendant's husband may have paid this note. This receipt does not purport to be in behalf of the plaintiff or for her, but merely certifies that plaintiff's husband has received payment in full. A son-in-law of defendant testified to a statement made by plaintiff's husband that the note had been paid and that he was looking for the note to satisfy his mother. The wife of the last-named witness testified that her brother, plaintiff's husband, was in the spring of 1905 searching for this note and said he would write a receipt to make his mother safe. A daughter of plaintiff's husband by his first wife testified to an admission on the part of plaintiff's husband that the note had been paid by defendant's husband, and that the latter wished to give the note back to defendant or her husband, and in case he did not find the note he would write a receipt for the defendant. On rebuttal the plaintiff testified that she never told her husband he might receive money in payment of this note, and never knew prior to September, 1905, anything about her husband settling or attempting to settle with the defendant for this note; that her husband told her about the collection of the note when she told him she would collect the note herself; and that this was in September, and in October following she commenced this action.

The burden of proof was on defendant to establish payment of this note to the plaintiff or her agent having authority to collect. The slight evidence of payment rests upon hearsay and incompetent testimony. This receipt, if otherwise competent, might evidence either payment or an attempted discharge by the son of his mother's liability on the note. In either event, and in order to make the receipt competent evidence, some authority from the payee in the note to collect the note or release the liability thereon must be shown by the defendant. Otherwise the release is not anything more than the unsworn statement of a third party. This authority cannot be inferred from the fact that he was plaintiff's husband, or that he contributed $400 of the amount necessary to make up this note, or from the fact that the note was kept in the common safe. The plaintiff, in an examination preliminary to trial, testified generally that she never collected any interest on the note and did not pay any attention to the interest because she had full confidence in her husband that she would receive it, and that at that time she trusted him with the management of her affairs. This was not made more explicit or followed up, but, on the other hand, the plaintiff testified that she never authorized her husband to collect the note.

There is no competent evidence against the decision of the circuit court, and the judgment must be affirmed.

By the Court.—Judgment affirmed.

EIERMANN, Appellant, vs. CITY OF MILWAUKEE and another, Respondents.

April 6—April 26, 1910.

Municipal corporations: Police power: Sidewalks: Special assessments: Defective construction: Acceptance by city: Fraud upon lotowner: Notice to city: Pleading: Amendment: Parties: Condition of relief.

1. In the exercise of the police power a city may construct a sidewalk and charge the expense to the adjacent lot regardless of benefits; but the XIVth amendment to the federal constitution is applicable, and the lotowner must not be deprived of his property without due process of law.
2. Under the charter of the city of Milwaukee (sec. 17, ch. VII), authorizing the board of public works to declare any sidewalk dangerous, and to employ any person to repair or relay it at a fair price, and to assess the expense upon the abutting land, it is the duty of the city to see that the contract for the work is fairly made at a reasonable price, with due regard to the lotowner's interest, and that it is substantially performed.
3. When in such a case a substantial walk is contracted for at a reasonable price, acceptance by the city of a substituted and worthless walk is not conclusive upon the lotowner, even though the walk was accepted through mere negligence and inattention and without actual fraud.
4. If the walk as accepted by the city is so defective or incomplete that a reasonable man cannot honestly say that there has been a substantial performance of the contract, there is in a legal sense a fraud upon the lotowner, and he is entitled to relief against the special assessment.
5. Proof of notice to the city officials of the defective character of the walk before its acceptance is not necessary to establish the cause of action, but merely tends to aggravate the fraud.
6. In an action against the city to set aside a special assessment for a sidewalk, if evidence that the city officials had notice, before its acceptance, of the defective character of the work was inadmissible because the complaint did not allege that fact, but such evidence was in fact admitted and before the court, the complaint should, upon proper terms, have been amended to conform to the proof.

7. Where the city has paid the contractor for constructing the sidewalk and is the owner of the improvement certificate against the property, the contractor is not a necessary party to an action against the city to set aside the special assessment because of the defective character of the work; but the city may have him brought in as a proper party.

[8. Whether the plaintiff, if he prevails in such an action, is entitled to have the assessment set aside and the assessment certificate canceled unconditionally, or should be required as a condition of relief to pay what the sidewalk was reasonably worth, not determined.]

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

This action is brought to set aside an assessment levied against the property of the plaintiff to defray the cost of a sidewalk constructed in front of his property. The city awarded the contract for building the walk to the Milwaukee Sidewalk Company. Such contract provided that the walk should be built according to certain specifications referred to therein. The plaintiff claimed that there were material departures from such specifications, and that, while they called for a good sidewalk substantially built, the one constructed was practically worthless, owing to its thinness and the character of the material and workmanship used in building it.

Evidence was offered on the trial tending to show that two of the aldermen knew of the condition of the walk before the same was paid for by the city, and also that the plaintiff advised the chairman of the board of public works of the condition of the walk some two months after it was laid and before it was paid for. Edward Schrantz, one of the aldermen from the ward in which the walk was laid, testified that he knew of its defective character shortly after it was laid and refused to sign the pay roll therefor. None of the facts were alleged in the complaint relating to notice to the city of the defective character of the work prior to the time of payment therefor. The city at first declined to pay for the walk, and

did not do so until about one half of it had been relaid. After a portion of the walk had been relaid the city paid the contract price for the entire job, assessed the cost thereof against plaintiff's property, and sold the same for nonpayment of the tax so levied. The certificates of sale were purchased by said city, and are still held, and the principal relief demanded is that such certificates be declared null and void and canceled.

After hearing the testimony offered by the parties the trial court struck out all evidence tending to show fraud on the part of the city because fraud was not alleged in the complaint, and sustained a demurrer *ore tenus* which had been interposed thereto before any evidence was offered thereunder. The plaintiff moved to amend his complaint so as to make it conform to the proofs offered, which motion was denied, and judgment was entered dismissing the complaint without prejudice and without costs, from which judgment this appeal is taken.

For the appellant there was a brief by *Friedrich, Teall & Hackbarth,* and oral argument by *F. C. Teall.*

For the respondents there was a brief by *John T. Kelly,* city attorney, and *Benjamin Poss,* special assistant city attorney, and oral argument by *Mr. Poss.*

BARNES, J. There was abundant evidence to show that the sidewalk as originally laid was well nigh worthless, although the contract called for a substantial walk. There was plenty of evidence to show that, after the contractor had been required to rebuild about half of it, the walk was still far from being completed in substantial compliance with the contract. It is true there is some evidence to the contrary in the record, but the trial court does not seem to have been impressed with it, and, as far as the record contains any expression of his opinion on the subject, it is to the effect that the walk, even after it was repaired, was radically different from and inferior to that contracted for.

We are met at the threshold of the case, however, with the argument that the city charter vests the power in the city officers to determine the fact as to whether or not a sidewalk has been built according to contract, and that such determination is conclusive on the lotowner in the absence of actual fraud; mere negligence and inattention to duty not being sufficient to impeach the action of the officers in accepting the work. A number of cases decided by other courts are cited as supporting the contention. Others are cited as holding a contrary doctrine. It would serve no useful purpose to discuss these cases in detail and point out wherein the statutes or the facts involved were dissimilar to the statute or the facts involved in this case. A consideration of the statute last referred to and of our own decisions and of some fundamental principles of law renders comparatively easy the matter of reaching a satisfactory conclusion.

The walk in question was built under the exercise of the police power pure and simple. The question of whether the lotowner was benefited or harmed thereby was not involved and was immaterial. Courts generally, including our own, have held that a city can construct a sidewalk and charge the expense against the adjacent lot under the exercise of the police power and regardless of benefits. *Lisbon A. L. Co. v. Lake,* 134 Wis. 470, 113 N. W. 1099.

Under the charter of the city of *Milwaukee* the board of public works may pass a resolution declaring any sidewalk to be dangerous, when in its judgment it is so, and may order the same repaired or relaid and employ any person to repair or relay the walk at a fair price, and by special assessment charge the expense thereof to the land abutting thereon, and such assessment is made a valid charge and lien against such adjacent property without any estimate, notice, letting, or other preliminary proceeding, except the resolution of the board of public works declaring the walk to be dangerous. Milwaukee City Charter (1905), ch. VII, sec. 17.

Thus, without any notice to the landowner, without any

assessment of benefits, even in the absence of them, with no voice as to the kind of a walk which shall be built, with nothing to say as to the price which shall be paid for the work or as to the character of the material used or the workmanship employed, and with no right of review or of appeal provided for in the charter, the adjacent land may be sold to defray the cost of building a sidewalk. The sole protection given to the landowner by the charter is that the walk must be repaired or relaid *"at a fair price."*

The proposition of the respondent is that, even though an expensive and substantial walk is contracted for and an adequate consideration is agreed upon for such construction, if, instead of the walk being built that the contract calls for, one is substituted that to all intents and purposes is worthless, and such walk is accepted by the proper officer of the city and is paid for through mere negligence or inattention to duty, the lotowner is remediless and must pay the bill, and when another new walk is ordered the same process may be repeated.

It would require considerable authority to convince us that such a walk was built at a "fair price," as the charter requires. It would require a strong array of precedents to convince us that the result contended for would follow if the words quoted had been eliminated from the charter. The rule which permits municipalities in the exercise of the police power to compel landowners to build sidewalks for the benefit of the public where they are not specially benefited themselves is, to say the least, drastic enough. To compel them to pay a sound price for a rotten and worthless walk, or sell their property in the event of their failure to do so, and to repeat this process indefinitely, would be equivalent to depriving them of their property without due process of law. Whatever may be the restrictions on the application of the XIVth amendment to the federal constitution to the taking of property under tax laws, the amendment has generally

been held to apply to the unlawful taking of property under the exercise of the police power.

When the city, in the exercise of the police power conferred on it, undertook to build a walk at the expense of the plaintiff, and contracted and agreed to pay for a substantial walk, it assumed the duty of protecting him from being plundered. He was no party to the contract and had no right to dictate to the contractor how the walk should be built. The city not only had such right, but owed a duty to the plaintiff to exercise it. By this we do not mean that technical or unsubstantial deviations from the contract should defeat the assessment or any part thereof. But where the sidewalk is so defective or incomplete in its construction that a reasonable man cannot honestly say that there is a substantial performance of the contract, then its acceptance by the authorities is in a legal sense a fraud upon the property owner and he is entitled to relief against the unjust charge. Contracts of the character here involved must be fairly made at reasonable prices with due regard to the lotowner's interest and must be fairly carried out. *Cook v. Racine,* 49 Wis. 243, 5 N. W. 352. In no other way can the charter provision requiring the walk to be built at a fair price be observed. The authorities to the effect that the acceptance is not binding on the lotowner, where it would operate as a fraud upon him, are quite numerous, and are cited under sec. 587, Elliott on Roads and Streets (2d ed.), and in notes 6 and 7 under sec. 534, 1 Page & Jones on Taxation by Assessment. This court has also held that where a city charter provided that the only remedy against a special assessment should be by appeal, and that no appeal should be taken after the assessment bonds were issued, and such issue might be made before the work was begun, and there was no provision for giving notice to the landowner of the proceedings taken, his right to go into a court of equity to challenge such proceedings could not be taken away. *Harrison v. Milwaukee,*

49 Wis. 247, 5 N. W. 326; *Hayes v. Douglas Co.* 92 Wis. 429, 65 N. W. 482; *Kersten v. Milwaukee,* 106 Wis. 200, 81 N. W. 948, 1103.

The complaint in this case alleged that the sidewalk as constructed was practically worthless. When it so stated, it set forth a fact which, in connection with other facts alleged, showed that a legal fraud had been perpetrated on the plaintiff. It stated a cause of action. Proof of notice to the city officials tended to aggravate the character of the fraud, but was not necessary to establish a cause of action in favor of the plaintiff. Whether such proof was admissible under the complaint may be doubtful. It was received, and, if the court thought error had been committed in admitting it, the complaint should have been amended to conform to the proofs. If the defendant was taken by surprise it should have been given a reasonable opportunity to meet this proof. The action should not have been dismissed.

The city paid the contractor for the work. It is not apparent, therefore, why the contractor was a necessary party, the city being the owner of the improvement certificate. In view of the contract relations existing between the city and the contractor, it would be convenient and proper for the city to have the contractor before the court, to the end that the latter might be concluded by the findings and judgment. But this is a matter with which the plaintiff is not concerned. If the city desired that the contractor be made a party it should have taken the necessary steps to bring the Sidewalk Company before the court.

The extent of the relief to which plaintiff may be entitled has not been discussed, and we do not feel called upon to say whether, if plaintiff prevails, he is entitled to have the assessment certificate canceled unconditionally, or should be required as a condition of relief to pay what the walk was reasonably worth. *Cook v. Racine, supra; Wells v. Western P. & S. Co.* 96 Wis. 116, 70 N. W. 1071.

The trial court did not dispose of the case on the merits. We understand from the record that the court was of the opinion that after the sidewalk had been partially rebuilt it did not substantially meet the requirements of the contract. If the trial court is of the opinion that further evidence should be offered, or that additional parties should be brought before the court in order that complete justice may be done, it is entirely proper that such proceedings should be taken. Otherwise the court should make findings of fact and conclusions of law and enter judgment on the evidence already taken. In the absence of such findings and judgment this court does not deem it proper to direct judgment to be entered on the merits.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to this opinion.

BANNEN, Respondent, vs. KINDLING and others, imp., Appellants.

April 6—April 26, 1910.

Pleading: Contracts: Prevented performance: Certainty: Sufficiency on demurrer: Relief: Adequate remedy at law.

1. Performance on plaintiff's part of a contract in respect to which relief is sought need not be alleged if the complaint shows that such performance was wrongfully prevented by defendants.
2. Where the complaint definitely sets forth the contract in suit it need not, even where specific performance is prayed, also allege in detail just what would be required to execute it, if those matters can be made certain by proof.
3. If the facts stated in the complaint, expressly and inferentially, upon any reasonable view, entitle the plaintiff to any judicial relief in equity against all or any of the defendents who join in a general demurrer, though it be not the relief specifically prayed for, or though the cause of action be not the one the pleader

supposed he had and intended to state, and regardless of mere indefiniteness of statement, it is sufficient.

4. Where the complaint shows that plaintiff has a right to have a partnership agreement carried out, or to have the partnership wound up, the objection that he has an adequate remedy at law is untenable.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The appealing defendants, *Louis Kindling, H. Buchenberger, Paul E. Apel,* and *Kindling Machinery Company,* joined in a demurrer to the complaint for insufficiency. The demurrer was overruled and this appeal is therefrom. This is the complaint, in substance:

In December, 1906, plaintiff and defendant *Louis Kindling* agreed to associate in establishing and operating a machinery business for placing on the market and vending a patented device for street cleaning, invented by Augustin Hentschel, of Berlin, Germany, each to contribute half the capital for the enterprise, bear half the losses, and have half the profits. To that end the parties mutually agreed to obtain, by purchase, the exclusive agency for the United States for the sale of machines made under such patent, and the option to become owners of such patent, and mutually agreed to form a $50,000 corporation, under the laws of Wisconsin, for handling the venture, to be called the *Kindling Machinery Company,* the necessary stock to secure capital for the enterprise to be taken by the parties in equal proportions. It was further mutually agreed that plaintiff should secure, as an associate in managing the business, Edward P. Hackett, plaintiff to hold the stock taken by him, in trust for himself and said associate, and to represent such stock in the corporate affairs, the control of the other half to be in said *Kindling;* and that upon the patent right being obtained and the corporation organized as contemplated, the property and business should be transferred to such corporation.

Articles of organization for the corporation were duly

made, filed and recorded, and all conditions precedent to the organization satisfied, plaintiff and said *Kindling* and defendant Olwell being the incorporators. Pursuant to the partnership contract, an agreement was made between the owners of the patent, securing to the Kindling Machinery Company, composed of plaintiff and his associate Hackett and *Kindling,* the exclusive agency, mutually agreed to be acquired as aforesaid and with an option to purchase the patent right for a consideration of $10,000. Thereupon the contemplated manufacturing and selling business was commenced. It was thereafter carried on for a considerable length of time in the name of the corporation though it was not yet perfected so as to enable the parties to change from their partnership to a corporate capacity.

Plaintiff and said *Kindling* contributed equally the capital. The active management was intrusted to plaintiff. In time the business became profitable and it was mutually determined to exercise the right to acquire the patent. The business in that regard was intrusted to *Kindling.* In breach of his trust he took an assignment of the patent to himself, though the consideration was in part paid out of partnership funds. Later the incorporators met, and thereupon plaintiff urged, as he had before, that the stock should be taken according to the partnership agreement, offering to carry out all his obligations in that regard, which he was able and willing to do. *Kindling* refused to go on with the agreement, except upon its being modified so as to enable him to take a seven-tenths interest and plaintiff and Hackett three tenths. Plaintiff thereupon offered to reimburse *Kindling* for so much of the expenditure as he had incurred in acquiring the patent right in excess of one half, and demanded transfer of such right according to the original plan. The offer and demand were refused.

Thereafter *Kindling* assumed the whole authority to perfect the organization of the corporation and, without comply-

ing with any of the conditions precedent to a meeting in that regard, a pretended meeting was held at which he subscribed for 300 shares of the stock and the defendants *Buchenberger, Apel,* and Eckerle, fifty each. Thereupon *Kindling, Buchenberger,* and *Apel* proceeded to perfect the organization by electing themselves directors and officers and accepting said subscriptions. The pretended directors thereafter assumed that the business aforesaid and all property in connection therewith were assets of the corporation, and conducted such business to the exclusion of plaintiff and defendant Olwell. All persons, acting adversely to plaintiff, knew, from the commencement of their association with *Kindling,* his relations to plaintiff and rights in the business which they, pretending to act for the corporation, usurped, taking to themselves, in the name of the corporation, the property and business opportunity and profits belonging to plaintiff and defendant Hackett.

The prayer for relief was of various kinds.

Louis G. Bohmrich, for the appellants.

For the respondent there was a brief by *Frank M. Hoyt,* attorney, and *Thomas M. Kearney,* of counsel, and oral argument by *W. D. Thompson.*

MARSHALL, J. The first proposition advanced by appellants' counsel, is that the complaint does not show respondent to have performed his part of the agreement respecting Hackett. It is a sufficient answer thereto that the agreement contemplated association of Hackett with respondent in the management of a corporation organized as stipulated between the parties, appellant *Kindling* controlling one half the stock and respondent the other half for himself and Hackett, and that, according to the pleading, appellants wrongfully prevented the creation of such condition.

The second proposition is that the complaint does not set forth, with sufficient certainty and particularity, the alleged

agreement to constitute a contract at law, warranting a decree of specific performance in equity. We are unable to discover any indefiniteness of statement. The agreement seems to be plain. It is suggested that the complaint is silent as to the amount of money necessary to carry on the business and the amount of stock that should be sold and the price per share. The two first suggestions are matters for proof. The agreement, itself, is definite enough. Just what may be required to execute it, in the respects mentioned, is susceptible of being made certain by proof. The theory suggested does not appear to be of consequence. Necessarily the stock should be sold at par, so far as anything appears in the complaint, and if not, that is a matter of proof. Many other suggestions are made by counsel as to the agreement being uncertain. It does not seem profitable to treat them in detail. All, in any event, can be made certain by proof. Moreover, they are quite as certain as such details could well be.

Further, all of counsel's strictures of this character are upon the theory that the complaint must stand or fall on a test of its sufficiency for specific performance. That is wrong. If the facts stated, expressly and inferentially, upon any reasonable view, entitle respondent to any judicial relief in equity, against all or any of the defendants, all having joined in the demurrer, though it be not for the relief specifically prayed for, or if the cause of action be not the one the pleader supposed he had and intended to state, and regardless of mere indefiniteness of statement, it is sufficient on the challenge for insufficiency. *Morse v. Gilman,* 16 Wis. 504; *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356; *Emerson v. Nash,* 124 Wis. 369, 102 N. W. 921; *Bieri v. Fonger,* 139 Wis. 150, 120 N. W. 862. If this plain and valuable rule of the Code were always kept in mind by members of the profession much useless expenditure of time of courts and counsel, to the detriment of public and private interest, would be avoided.

The point that plaintiff has an adequate remedy at law is clearly untenable. Respondent has a legal right to have the partnership agreement carried out, or have it wound up. Having no legal remedy to enforce that right, manifestly, as has often been said, equity will extend such remedy as is within its competency to afford.

The last proposition is that the complaint shows that plaintiff rescinded the agreement for the formation of a corporation, which is the foundation of his cause of action, and, as he elected to rescind, he cannot proceed for specific performance.

This last proposition seems to have sprung from a variety of misconceptions: (a) Plaintiff attempted to state a cause of action for specific performance of the agreement to form a corporation, and to participate therein in equal proportions, and that no other cause of action is, therefore, available on the pleading. Plaintiff evidently did not attempt to state any particular cause of action by name. He intended to state, and seems to have succeeded well in stating, a history, in detail, of the making of a contract with appellant *Kindling,* the acts done under it by both parties, the breach of it by *Kindling,* and participation in his wrongdoing of others who thereby became connected with the subject of the action, intending to state plainly all facts and praying, specifically, for such relief as was thought proper, and, generally, for other relief, leaving it to the court upon the case as ultimately established by evidence, to award the proper relief. That was right. Plaintiff's cause of action is not, necessarily, for specific performance, as we have indicated. It is for any relief within the field covered by the pleading, which may be established by the evidence. (b) Counsel's proposition supposes a first agreement for a partnership and a second one for a corporation. There was but one agreement. One of the material parts thereof was to form the corporation to take over and continue the partnership business under a corporate

name. (c) We fail to find any evidence of rescission of the partnership feature of the agreement. Respondent seems to have insisted upon having that feature carried out or upon preserving his interest in the business as a partnership affair.

What has been said sufficiently covers the case. The pleading seems to have the merit of being a plain and complete detail statement of transactions of making a business agreement and acts under and breaches of it. That it states grounds for such relief as will remedy the wrongs complained of, hardly admits of serious discussion.

By the Court.—Order affirmed.

FRANCIS & NYGREN FOUNDRY COMPANY, Respondent, vs. KING KNOB COAL COMPANY and another, imp., Appellants.

April 7—April 26, 1910.

Lien of subcontractor: "Furnishing" of materials.

Mere delivery of materials by a subcontractor to the principal contractor, where such materials neither enter into the structure for which they were intended nor reach the premises or the control of the owner of the structure, does not constitute such a furnishing of the materials as entitles the subcontractor to a lien under sec. 3315, Stats. (1898).

APPEALS from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

Defendant *King Knob Coal Company,* under a verbal contract for a lease with a railway company, contracted with the Hoisting & Conveying Machinery Company to construct and place upon certain land of the *Chicago, Milwaukee & St. Paul Railway Company* at Milwaukee coal-handling machinery to the extent of about $95,000, which by the contract of lease was not to become a part of the realty, but to be removable at

pleasure by the coal company. The machinery company, principal contractor, ordered a considerable amount of castings from the plaintiff, some if not all of which were intended for the machinery so contracted for. Plaintiff furnished such castings from time to time to the machinery company at its place of business in Chicago, whence the machinery company transported the same to Milwaukee. The last articles supplied by the plaintiff which actually reached the premises were delivered October 14, 1905, but on October 26, 1905, the plaintiff delivered at the place of business of the machinery company in Chicago one gear wheel of value about $13, intended for use in the construction of said machinery. November 17, 1905, the machinery company became bankrupt, and at some time thereafter the receiver in bankruptcy, having taken possession of all its property, sold this gear wheel to a stranger. Ultimately the coal company purchased it from such third person and used it in completing the machinery left incomplete by the machinery company. On December 21st the plaintiff gave its notice of claim for subcontractor's lien, alleging the delivery of said gear wheel as the last charge.

The trial court, finding substantially the above facts, held that such delivery was a sufficient furnishing to the owner to bring it within the statute and thus to render the notice valid and effective as within sixty days from that date. It accordingly rendered judgment for allowance of plaintiff's entire bill and for enforcement of subcontractor's lien both against the plant of the coal company and also against the land belonging to the railway company whereon it was situated, from which judgment the coal company and the railway company separately appeal.

W. A. Walker, Jr., attorney, and *W. C. Quarles*, of counsel, for the appellant *King Knob Coal Company*.

C. H. Van Alstine, for the appellant *Chicago, Milwaukee & St. Paul Railway Company*.

For the respondent there was a brief by *H. T. Wilcoxson* and *Lynn S. Pease,* and oral argument by *Mr. Pease.*

DODGE, J. The primary question is whether a subcontractor by merely delivering material to the contractor at his place of business which the latter never incorporates with the structure upon which the lien is claimed, nor even delivers to the premises or control of the owner of that structure, can be said to have furnished that material for, in, or about the construction of the machinery in the true sense of those words as used in sec. 3315, Stats. (1898). The expressions of every decision in this state are adverse to any such conclusion. It has been asserted or assumed from the earliest days that incorporation of the materials into the structure was an essential to a subcontractor's lien therefor. *Jessup v. Stone,* 13 Wis. 466, 471; *Heath v. Solles,* 73 Wis. 217, 220, 222, 40 N. W. 804; *Hall v. Banks,* 79 Wis. 229, 233, 48 N. W. 385; *Mallory v. La Crosse A. Co.* 80 Wis. 170, 175, 49 N. W. 1071; *Brown & H. Co. v. Trane,* 98 Wis. 1, 73 N. W. 561; *McAuliffe v. Jorgenson,* 107 Wis. 132, 134, 82 N. W. 706; *Rinzel v. Stumpf,* 116 Wis. 287, 290, 93 N. W. 36; *Laev L. Co. v. Auer,* 123 Wis. 178, 183, 101 N. W. 425; *Taylor v. Dall L. & Z. Co.* 131 Wis. 348, 355, 111 N. W. 490. It is true that the exact distinction was not presented for decision by the facts of any of the cases cited, so that the remarks in the decisions are in a degree *obiter,* but nevertheless they are significant of the view of the court as to proper construction of this lien statute, which construction is therefore confirmed by the many years of persistency without legislative attempt to modify it in this particular. In many other states having statutes with substantially equivalent language to our own there are numerous decisions upon the exact question, many of them declaring actual incorporation and annexation to the realty to be essential, though in some there is permitted as apparently equivalent delivery of the property into the con-

trol of the owner. *Simmons, G. & Co. v. Carrier,* 60 Mo. 581, 584; *Schulenberg v. Prairie Home Inst.* 65 Mo. 295; *Potter Mfg. Co. v. A. B. Meyer & Co.* 171 Ind. 513, 86 N. E. 837; *McConnell v. Hewes,* 50 W. Va. 33, 40 S. E. 436; *W. P. Fuller & Co. v. Ryan,* 44 Wash. 385, 87 Pac. 485; *Hill v. Bowers,* 45 Kan. 592, 26 Pac. 13; *Hunter v. Blanchard,* 18 Ill. 318. In the face of this array of judicial decision we find none either in this state or in states having equivalent statutes asserting the sufficiency of facts like those in the present case to constitute a "furnishing" so as to arouse a lien. True, this court has decided that in the case of a principal contractor the delivery on the premises of materials upon a contract with the owner that they should be used in the structure will entitle him to a lien therefor, although the owner sells them and uses others in their place. *Esslinger v. Huebner,* 22 Wis. 632. But the facts in that case radically distinguish it from the present. There the material was delivered into the control of the owner, and he by his own wrong prevented its incorporation into the building as intended and expected by the seller and as agreed to be done by such owner. The diversion from that purpose was in breach of the owner's own contract with the lien claimant. Here the owner had no means of protecting itself, and was in no way responsible for the nonuse of the material, and owed no contract duty to the plaintiff to apply it in construction of the machinery.

The intent of the legislature seems to be clearly indicated by the final sentence of sec. 3315, Stats. (1898), imposing penalty on a principal contractor who sells or misappropriates material delivered to him by a subcontractor without his consent and with intent to defraud the latter. Obviously, if such a delivery aroused the lien, the subcontractor could not be defrauded by the misappropriation of the material. The owner would be the sufferer and the person whose consent to diversion ought to control. *Simmons v. Carrier, supra,* holds such a provision conclusive of the legislative purpose. Fur-

ther, there are many considerations of probable wrong to the owner against which no reasonable diligence or watchfulness can guard him if mere delivery, without his knowledge, to the principal contractor may suffice to make him liable, many of which are pointed out in the decisions above cited; while the superior opportunities for the materialman by watchfulness and diligence to see to it that material which he knowingly sells for use upon certain premises shall at least reach those premises and their owner are so obvious that we are constrained to agreement, on reason, with the clear weight of authority as above set forth, and to hold on the facts here, where the material neither enters into the structure nor even reaches the control of the owner, that it is not such a furnishing as the statute intends and requires, and that therefore the material delivered on October 26th at the principal contractor's place of business in Chicago and by him or his receiver in bankruptcy sold away from the owner was not so furnished. Hence the last charge for furnishing any lienable material was October 14th, and more than sixty days before any notice was given by the plaintiff to entitle it to a subcontractor's lien.

The conclusion is of course obvious, without discussing further objections urged by one or other of the appellants, that plaintiff is entitled to no lien either upon the machinery contracted for by the *King Knob Coal Company* or upon the land of the *Chicago, Milwaukee & St. Paul Railway Company* upon which such machinery was to be erected.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

DEMARK, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

April 7—April 26, 1910.

Release of claim for injuries: Validity: Impeachment: Evidence: Appeal: Review: Questions for jury.

1. It appearing from the evidence that plaintiff, an Italian who was ignorant of English, understood the Italian spoken by an interpreter through whom the terms of a settlement of his claim against defendant for personal injuries were arranged, testimony as to differences in Italian dialects, offered for the purpose of showing that he did not fully understand the interpretation of a release signed by him, was properly excluded.
2. That the contents of such release were not misstated or misinterpreted to plaintiff, and that he was not coerced or otherwise misled into signing the paper, is *held* to be shown by the evidence.
3. To impeach a formal written instrument on the ground that its execution was procured by coercion or fraud, the proof should be clear and convincing beyond reasonable controversy.
4. In reviewing evidence which the trial court held did not present any question for the jury as to the impeachment of a formal writing, weight should be given to the opinion of the trial judge who saw the witnesses.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries alleged to have been due to the negligence of a servant of the defendant. The defendant operates a street railway in the city of Milwaukee. About 6 o'clock on the morning of March 28, 1907, the plaintiff boarded a car for the purpose of going to his work. The plaintiff alleges that he received the injuries complained of through the negligence of the motorman, who, after slacking the car for plaintiff to alight, without looking to see whether plaintiff had alighted, suddenly turned on the current and caused the car to start for-

ward with a sudden jerk and increase of speed, by which the plaintiff was thrown from the platform, inflicting injuries which required the amputation of his leg below the knee.

The defendant denies any liability to the plaintiff, on the ground that he was guilty of contributory negligence, and also alleges as a further and separate defense that on June 24, 1907, the plaintiff executed to the defendant a release of all claims and demands on account of the injuries received by him. Plaintiff claimed that he had been overreached and defrauded at the time the release was given, that he did not understand the release, and that the release did not contain the agreement which was actually made. Plaintiff received $250 as a consideration for the release. He has also received from the defendant an artificial limb. No mention is made in the release of the artificial limb. The plaintiff testified that at the time the release was given he was promised a life job and additional money. The interpreter, who had been secured by the plaintiff because plaintiff did not speak English, testified that at the time the release was given the plaintiff requested that he be given a life job, but that the agent of the company informed her that the company would not promise any such position, and that she, in turn, informed the plaintiff that the company would not agree to give him a life job or promise future employment, and she also explained to him that the $250 was in full satisfaction of his claim. Although the interpreter went with the plaintiff to aid him to confer with the defendant's agent in this matter, she was paid for her time by the defendant. The release was made by the plaintiff with the agent of the company through the interpreter and in the absence of the attorney of the plaintiff. At the conclusion of the evidence the trial court granted defendant's motion for a direction of a verdict, and stated that he felt assured from the evidence that the plaintiff understood the nature of the release and that no fraud had been shown. This is an appeal from the judgment.

For the appellant there was a brief by *Gross & Saltzstein*, and oral argument by *Edwin J. Gross*.

Clarke M. Rosecrantz, for the respondent.

SIEBECKER, J. It is strenuously argued that the plaintiff was ignorant of the contents of the release, due to the facts that he understood no English; that he could not read it; and that, owing to differences in the Italian spoken by him and the interpreter, the interpretation of it given to him was not fully understood by him. The plaintiff's evidence bearing on what occurred at the time of settlement shows that he understood the defendant's representative was negotiating with him for a settlement of the claim he made for damages. Shortly after the accident he had an interview with the company's representative at the hospital, and he then stated that if the company would pay him $5,000 the matter would end there. This the company refused to consider. It appears that he and Mrs. Curley, the interpreter, called at the defendant's office a few days after he left the hospital, and through Mrs. Curley he again stated his story of the accident. By arrangement with Mrs. Curley they again went to the defendant's office a few days thereafter, and the release was then executed. It is shown that Mrs. Curley had theretofore been engaged by the defendant to interpret between its representatives and Italians who could not speak English, and that she received compensation from the defendant company for the service so rendered by her in this case. On the occasion of the execution of the release plaintiff states that he was offered $250 in money and the cost of an artificial limb in settlement of his claim, but that he refused to accept such offer and insisted that the defendant obligate itself to employ him for life, and that he understood this condition was agreed to by defendant's agent who negotiated the settlement. He states that its omission from the written release was not brought to his attention by the interpretation of the writing, and that he

had no knowledge of its contents except such as was communicated to him by the interpreter. We think the evidence wholly fails to show that he was incapable of understanding the Italian spoken by Mrs. Curley, the interpreter. His evidence discloses that he was fully apprised of the terms of the settlement, except as to his claim that he was to be employed by the defendant for life. He received the money with the understanding that it was to be applied in payment of his claim for damages. It is undisputed that he received his information from Mrs. Curley. This shows that he understood her. In the light of these facts, the objection to receiving La Piana's testimony as to differences in Italian dialects was properly sustained.

The question is: Does the evidence show that the plaintiff was induced to sign this release through misrepresentation and undue influence? It is claimed that the interpreter, Mrs. Curley, did not correctly interpret the release to plaintiff and fully inform him as to its contents. In so far as the evidence conflicts on this subject it is a dispute between him and the interpreter. She testifies that she correctly interpreted the writing to him and explained its contents. It is manifest that she understood its import and effect. The facts and circumstances of the transaction and plaintiff's admission of what she told him respecting it confirm her assertion that he understood and comprehended the transaction. She testified positively that she interpreted the writing to him and explained its contents. As stated above, plaintiff's course in the affair confirms her in this claim. It is clear that he was not deceived by having the release misstated to him.

Can it be said that the evidence shows that he was coerced or otherwise misled into signing the paper? His claim that he was told that the company had a paper signed by his cousin showing the accident was his own fault, and that if he litigated the matter it would take a long time and he would get nothing in the end, is denied by the interpreter and the com-

pany's agent. These facts and the accompanying circumstances of the transaction, in view of the conflicting claims of the parties as to defendant's liability, make no such clear affirmative showing as the law requires to impeach the written release and set it aside. The probative force of plaintiff's evidence for such impeachment is of slight weight, and it is fully neutralized by the facts and circumstances of the case and by the positive evidence of the other parties who witnessed the transaction.

"To accomplish impeachment of a formal written instrument on such grounds, the proof must be clear and convincing beyond reasonable controversy." *Steffen v. Supreme Assembly,* 130 Wis. 485, 110 N. W. 401, and cases cited.

The trial court had the advantage of seeing the witnesses as they testified, and concluded that the evidence presented no question for the jury as to the impeachment of this formal writing. Under such circumstances, in passing on such evidence its opinion should be given weight in this court.

We are persuaded that the judgment dismissing the complaint should be sustained.

By the Court.—Judgment affirmed.

COTZHAUSEN, Respondent, vs. GOETZ, County Treasurer, imp., Appellant.

April 8—April 26, 1910.

Appeal by part of defendants: Reversal: Subsequent appeal by another: Law of the case: Independent liabilities.

1. After appeal by some of the defendants and reversal in the supreme court, upon a subsequent appeal by a defaulting defendant who did not join in the former appeal the record in the court below must be considered as if amended by the decision on the first appeal.

2. Where upon the first appeal the cause is dismissed as to several defendants, the record contains no support for a judgment against the last appealing defendant upon any liability which must be traced through the acts of his codefendants which are concluded adversely to the plaintiff by the decision on the first appeal.
3. In such case, if there is an independent ground of liability as against the last appellant not traceable through his codefendants, the judgment will be affirmed on the later appeal.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *A. C. Backus,* district attorney, and *N. L. Baker,* assistant, and oral argument by *Mr. Baker.*

For the respondent there was a brief by *Arthur von Cotzhausen,* attorney, and *Jones & Schubring,* of counsel, and oral argument by *E. J. B. Schubring.*

TIMLIN, J. In an action brought by respondent to relieve his land from a certain ditch assessment and to enjoin the threatened sale thereof by the county treasurer for the nonpayment of such assessment, the town officers answered, but the appellant defaulted. The respondent on notice to all parties, including the appellant, moved for judgment on the pleadings, which was granted by the circuit court, but reversed by this court in *Cotzhausen v. Dick,* 138 Wis. 127, 119 N. W. 822, upon appeal of the answering defendants, in which appeal the present appellant did not join. The decision of this court and the judgment rendered or to be rendered in pursuance thereof thereby became part of the proceedings in this cause, with the same effect as regards the appellant as if that judgment had been rendered as to all the other defendants in the cause by the circuit court in the first instance. Afterward this appeal was taken. So far as the appellant's liability to injunction rests upon the alleged in-

validity of the assessment held upon the former appeal not to be subject to attack by the respondent, the judgment here appealed from could not be sustained. But there is an additional ground for supporting the judgment as against the present appellant. It appears from the record upon which judgment was rendered that the ditch passes through the lands of the plaintiff, described as "the south forty acres of the east one-half of the southwest quarter of section seven," etc., and that the cost of constructing the ditch was by the supervisors assessed against the aforesaid tract. But the town clerk placed this item of special assessment against a tract of 130 acres belonging to the respondent and including the tract first described, and he made such return of delinquent tax to the present appellant, the county treasurer, who thereafter threatened to sell and did sell and was about to issue a tax certificate of sale of all said 130 acres for such unpaid special assessment.

Construing the judgment in this cause as amended by the decision of this court upon the former appeal, there is nothing in that judgment which restrains the county treasurer from selling the forty-acre tract upon which said special assessment was actually made. He is merely enjoined from selling or issuing a tax certificate upon the 130 acres. He is at liberty to advertise for sale and sell the other tract of forty acres against which the special tax really was assessed. The judgment here appealed from, therefore, properly stands against the present appellant, and is supported so far as it interdicts him from selling or issuing a tax certificate of sale of said 130 acres; hence it cannot be reversed on this appeal by such defaulting party, who must show that the judgment has no support. This he has not done.

By the Court.—Judgment affirmed.

SCHUMACHER, by guardian *ad litem*, Respondent, vs. TUTTLE PRESS COMPANY, Appellant.

April 8—April 26, 1910.

Master and servant: Injury to minor servant: Assumption of risk: Questions for jury: Instructions: Burden of proof: Immaterial errors.

1. A minor servant assumes the risk of open and obvious dangers of work in which he may lawfully be employed.
2. But an inexperienced minor is not always charged with knowledge of risks which might be obvious to an adult, and will not be deemed as matter of law to have assumed such risks unless it appears that he not only knew or ought to have known the proximity of the dangerous agency from which the injury resulted, but also comprehended and appreciated, or ought to have comprehended and appreciated, the extent of the risk to which its proximity subjected him, especially where the situation is obscure or complex.
3. In an action for injuries to a boy sixteen years old whose hand was caught and crushed between rollers in a rotary printing press, the questions as to whether he knew or ought to have known and comprehended the danger of such injury were, upon the evidence, properly for the jury.
4. In charging the jury respecting question No. 12 of the special verdict, which asked whether defendant's failure to give proper warning was the proximate cause of plaintiff's injury, the trial judge referred twice to "this question No. 12." He defined proximate cause, and stated that plaintiff contended that such failure to give warning was the proximate cause of the injury, but that defendant contended that the proximate cause was plaintiff's own negligence and carelessness, and then said: "The burden of proof on this question is on the defendant." *Held*, that the words "this question" in the last statement must have been understood by the jury as referring, not merely to defendant's contention as to plaintiff's negligence, but to the question in the special verdict which they were required to answer; and the charge was therefore erroneous, the burden of proof as to such question being on the plaintiff.
5. Misplacing the burden of proof as to a material question in a close case is an error affecting a substantial right and necessitating a reversal.

6. Refusal to give a requested instruction is not prejudicial to the party requesting it when by such refusal he is relieved of the burden of proving a certain fact.
7. Requested instructions correctly placing the burden of proof as to material questions in the special verdict should be given.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Personal injuries. The plaintiff was employed by defendant in July, 1908, as an errand boy and to do sweeping out and general work about its large printing plant. He worked in this capacity till October, when he was set to work at a rotary printing press and was injured two or three days later, at which time he was ten days more than sixteen years old. This press was twelve feet long east and west, four feet wide, and four feet in height. It rested on two twelve-foot steel beams running east and west, which in turn rested on the cement floor of the pressroom. Under the press was a pit nineteen and one-half inches deep below the floor. In this pit plaintiff was set to work. It was his duty to sit or partially recline upon the floor of the pit under the east end of the press and in such position as to watch some slitters or shears some distance above his head near the southeast corner of the framework of the machine, which slitters trim off the margin of the paper before it passes between the printing rolls. It was further his duty to shove the shavings from the slitters back towards the west end of the pit as they accumulated, and if the slitters became clogged it was his duty to grasp a rope near at hand and give it a jerk, and thus stop the press in order that the tangled paper shavings might be removed. This rope or cord was fastened to the electric controlling lever on the south side of the press, and then ran down into the west end of the pit and back nearly to the east end thereof, and was tied to the center of a steel beam which ran from north to south between the two twelve-foot beams on which the press rested. This crossbeam was nine and three-

fourths inches from the east end of the pit, and was immediately above the plaintiff's shoulders as he reclined in the pit. Above this beam and a little to the west thereof were the large type roller and a smaller ink roller of the press which ran together in contact turning upwards, their point of contact being thirteen and one-half inches above the lower side of the transverse steel beam.

On the evening of October 15, 1908, at about 9:15 o'clock, while the plaintiff was at work in the pit, his right hand was caught between the two rollers above mentioned and drawn in and badly mangled and crushed before the machine could be stopped. The plaintiff claimed that as he was watching the slitters and moving back the shavings the slitters clogged, and he grabbed for the rope to stop the press, but grabbed too high, and that his right hand went in between the rollers. The negligence claimed was that he was not sufficiently warned of the danger before he was set at work.

A special verdict was found by the jury to the following effect: (1) That the plaintiff was injured as stated; (2) that the rollers were so located as to be dangerous to an employee working in the pit; (3) that plaintiff did not know at the time of the injury that there was danger of serious injury to him from working in the pit by getting his hand into the rolls; (4) that the plaintiff in the exercise of ordinary care ought not to have reasonably anticipated that there was such danger; (5) that the defendant in the exercise of ordinary care ought to have foreseen that such rollers might probably cause personal injury to an employee working where plaintiff was working; (6) that defendant ought to have known that plaintiff required warning in order to comprehend the danger incident to his employment; (7) that plaintiff was not of sufficient age, understanding, and experience to comprehend such danger; (8) that no want of ordinary care on plaintiff's part contributed to his injury; (9) that there was danger in plaintiff's work which was not open and obvious to a person

of his age, experience, and apparent intelligence; (10) that defendant ought to have anticipated that plaintiff would not know of such danger and might, because of his ignorance, probably be injured as he was; (11) that defendant did not give plaintiff sufficient warning and instruction to advise him of the danger to which he was subjected; (12) that such lack of warning was the proximate cause of plaintiff's injury; (13) that plaintiff's damages were $4,000. The defendant moved for judgment *non obstante,* also to set aside the verdict, and for a new trial in case the former motion should not be granted. Both motions being denied and judgment entered on the verdict for the plaintiff, the defendant appeals.

C. G. Cannon, attorney, and *C. B. Bird,* of counsel, for the appellant.

For the respondent there was a brief by *Albert H. Krugmeier* and *Fred V. Heinemann,* and oral argument by *Mr. Krugmeier.*

WINSLOW, C. J. The defendant's chief contention is that a verdict for the defendant should have been directed on the undisputed evidence because the danger was so open and obvious that the plaintiff, though only a boy of sixteen, must be held to have assumed the risk. In support of its position appellant cites *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615, 71 N. W. 1034; *Bigelow v. Danielson,* 102 Wis. 470, 471, 78 N. W. 599; *Helmke v. Thilmany,* 107 Wis. 216, 83 N. W. 360; *Groth v. Thomann,* 110 Wis. 488, 86 N. W. 178; *Upthegrove v. Jones & Adams C. Co.* 118 Wis. 673, 96 N. W. 385; *Horn v. La Crosse B. Co.* 123 Wis. 399, 101 N. W. 935; *Kuich v. Milwaukee B. Co.* 139 Wis. 101, 120 N. W. 261; and cases of a similar nature from other jurisdictions. On the other hand, the respondent cites and relies upon *Chopin v. Badger P. Co.* 83 Wis. 192, 53 N. W. 452; *Thompson v. Johnston Bros. Co.* 86 Wis. 576, 57 N. W. 298; *Renne v. U. S. L. Co.* 107 Wis. 305, 83 N. W. 473; *Van de*

Bogart v. Marinette & M. P. Co. 127 Wis. 104, 106 N. W. 805; *Wankowski v. Crivitz P. & P. Co.* 137 Wis. 123, 118 N. W. 643; and *Novak v. Nordberg Mfg. Co.* 141 Wis. 298, 124 N. W. 282.

That the case is a close one is undeniable. There are many such and of necessity must be. It is not that the rules of law applicable are doubtful or involved, but that the facts of no two cases are alike, and there must be a large field where it is difficult to say whether a given case reaches or crosses the line which the law lays down as the limit. In such cases two different minds will be apt to reach different conclusions, though both be honest and both be attempting to apply the same abstract principle of law. The infirmity is one inherent in the human reason. In no class of cases is the difficulty more serious than in the class covering injuries to minor employees resulting from the operations of complicated machines about which they are working. That seems to be demonstrated by the confidence with which both sides in the present case cite and rely upon Wisconsin decisions. Could there be found some infallible rule which could be automatically applied to every such case and determine with mathematical exactness whether or not the plaintiff was entitled to recover, this court would be relieved of much labor. But there can be none.

It is settled of course that, notwithstanding the fact of his infancy, a minor assumes the risks resulting from open and obvious dangers, at least if the minor has reached the age when he may be lawfully employed in such labor. But what may be an open and obvious danger to an experienced adult may not be such to an inexperienced minor and hence there will infallibly be cases where, under the application of this rule, a court must direct judgment against an adult while under precisely the same circumstances it could not rightly do so in the case of a minor. This is not only humane but logical. The child presumably lacks the reflective and reasoning

power as well as the experience of the man, and the law, which is supposed to be the perfection of human reason, makes allowance for the deficiency in this respect of the childish character. So this court has, in no uncertain terms, laid down the rule that while the ordinary adult assumes the risks resulting from open and obvious dangers which he knows or ought to know, and cannot say he did not fully comprehend or appreciate them, the inexperienced minor is not always charged with knowledge of risks which to the adult are obvious, and he does not as matter of law assume such risks unless it appears that he not only knew or ought to have known the proximity of the cog wheel or roller or other dangerous agency from which the injury resulted, but also comprehended and appreciated, or ought to have comprehended and appreciated, the extent of the risk to which its proximity subjected him. Especially is this latter rule applicable in a case where the situation is obscure or complex. *Gierczak v. Northwestern F. Co., ante,* p. 207, 125 N. W. 436. There are cases, as the decisions cited show, where the court is justified in holding as matter of law that a minor assumed the risk; but it will be found on examination that they are generally cases where the minor was nearly of age and had had a man's experience, or where the situation was free from obscurity or complexity, the danger in plain sight, and the minor's attention necessarily directed toward the dangerous knife, or cog, or roller by the very nature of the business.

We regard the present case as peculiarly one for the jury and not for the court. The plaintiff here was compelled to work in a very cramped position and in poor light. He had nothing at all to do with the rollers in which his hand was caught. While he knew there were rollers in that general direction, he had never had occasion to observe closely their proximity to himself. His duty was to closely watch the slitters and to be ready to act quickly in case of the shavings becoming clogged. While so engaged the rollers were not

only out of his mind, but the testimony tends to show that they were also out of his range of vision by reason of the interposition of the steel crossbeam between his eyes and the rollers. The rope also which he was required to pull was outside of his range of vision, and he had to grab at it from general knowledge of its location rather than from vision. Under all these circumstances, which the evidence either proved or tended to prove, we think that the case was a proper one for the jury.

Two minor rulings upon evidence are assigned as error, but we do not consider them as of sufficient importance to require treatment. There was certainly no prejudicial error in either of them.

A question of serious difficulty arises upon the charge. The twelfth question asked the jury whether the lack of warning was the proximate cause of injury. The court in charging the jury told them that if they answered question No. 11 "Yes," they need not answer "this question No. 12" at all, but that if they answered question No. 11 "No," then they must answer "this question No. 12." The court then correctly defined proximate cause and proceeded as follows:

"It is contended on the part of the plaintiff that the failure to give proper warning and instruction to the boy or this plaintiff was the proximate cause of the injury. On the part of the defendant, however, this is denied, and it is contended that this was not the proximate cause of the injury, but the proximate cause of the injury was the boy's own negligence and carelessness. It is for you to determine what the fact was. The burden of proof on this question is on the defendant. By burden of proof is meant that the party which has the burden of proof must satisfy you by a preponderance of the evidence of the facts claimed. After considering all the evidence, then you will answer that question either 'Yes' or 'No' as you may find the fact to be."

It will be noticed that the court here told the jury plainly that the burden of proof on "this question" was on the defend-

ant. If "this question" meant question No. 12, this instruction is admitted to be error, because the plaintiff always has the burden of showing that the negligence complained of was the proximate cause of the injury. But it is claimed that "this question" as here used must have been understood to refer to the defendant's contention which had just been stated, namely, that the boy's own negligence was the proximate cause of the injury. We should prefer to so hold. Doubtless this was the intention of the trial judge, whose learning and long experience forbid us from entertaining the idea that he intentionally charged the jury that the defendant had the burden of proof on the question of proximate cause. But the difficulty is that we can see no justification for so holding. In the first part of the instruction the judge had referred twice to "this question," both times referring to question No. 12. After stating four intervening propositions he again refers to "this question." He had stated two contentions, but he had stated no new question save in the sense that a matter under consideration is sometimes called a question. He had used the word "question" many times in his charge before reaching this point, and always with distinct reference to one of the questions of the special verdict. There can be no reasonable doubt, we think, but that the jury must have understood the word "question" in its true, natural sense as referring to the question which they were required to answer.

The instruction being erroneous, the next inquiry is whether it appears to have affected the substantial rights of the defendant, for, unless it does so appear, the judgment is not to be reversed on that ground. Sec. 3072*m*, Stats. (Laws of 1909, ch. 192). That it does so appear we cannot doubt. Where a question of fact is close and doubtful, as in this case, the question of which side has the burden of proof is always of great importance. Any one who has tried a question of fact himself upon evidence nearly evenly bal-

anced has experienced the importance of the rule, and has frequently been compelled to decide such questions on the consideration alone that he upon whom lay the burden of proof had not been able to lift it. To have this burden wrongly placed on the crucial point of a close case seems unquestionably to be the deprivation of a substantial, not a mere technical, right. We therefore reluctantly conclude that this error necessitates reversal. *Grenawalt v. Roe,* 136 Wis. 501, 117 N. W. 1017.

There were certain refusals to instruct which must also be noticed. The third question asked whether the plaintiff knew that there was danger of getting his hand in the rolls while working in the pit, and the defendant asked to have the jury instructed that unless they were satisfied to a reasonable certainty by the fair preponderance of the evidence that this question should be answered "Yes," then they must answer it "No." This was doubtless a correct instruction, but its refusal could work no prejudice to the defendant. The error thereby committed was favorable to the defendant, for the reason that it was relieved from assuming the burden of proving knowledge of the danger or assumption of risk. The same instruction was asked as to the fifth and sixth questions and manifestly should have been given. Affirmative answers to these questions were necessary links in the chain of facts constituting negligence on the part of the defendant, and it was entitled to instructions requiring that such facts be proven by the preponderance of the evidence.

The eleventh question asked whether sufficient warning of the danger was given by defendant, and on this question it requested an instruction that it should be answered "Yes," unless the jury were satisfied by the preponderance of the evidence that it should be answered "No." This instruction was refused, but it should have been given. A negative answer to this question was another necessary link in the chain

of facts constituting defendant's actionable negligence, and hence the burden was on the plaintiff to produce evidence justifying such an answer.

There are no other contentions made which are deemed of substantial merit.

By the Court.—Judgment reversed, and action remanded for a new trial.

SIEBECKER, J., dissents.

LA CROSSE PLOW COMPANY, Appellant, vs. BROOKS and another, Respondents.

April 8—April 26, 1910.

Sales: Implied warranty of fitness: Verdict.

1. In an action for the sale price of an article, if the defendant counterclaims for a total breach of warranty of fitness, pleading tender back of the article, and on the trial wholly defeats plaintiff's claim, it is irregular for the jury to pass upon the title to such article, and a finding in that regard should be treated as surplusage.
2. If a person orders of another a known and described article and obtains it, he takes the same without implied warranty that it will prove suitable for the use designed, or his use.
3. If in addition to circumstances in the last foregoing proposition the purchaser, upon ordering the article, states to the dealer the purposes for which he desires the article, that does not change the rule that upon stating the exact subject of his purchase he takes without implied warranty of suitableness for the particular purpose.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Action to recover a balance due for farm machinery of

various kinds sold and delivered by plaintiff to defendants. The amount claimed was $367.14, with interest. Defendants counterclaimed for breach of express warranty respecting a gang plow which was one of the implements charged in the account. The claim was that the plow was bought on the faith of specific assurance of its fitness for the work for which it was designed and purchased; that upon trial it failed to satisfy the guaranty and proved useless for the purpose it was purchased; that thereupon defendants offered to return the same, but plaintiff refused to receive it.

As the case was submitted there is no question but that plaintiff was entitled to recover according to the prayer of the complaint, unless it was liable for a reduction because of warranty as to the plow.

The evidence in respect to the plow was, substantially, this: Plaintiff was a manufacturer, among other farm implements, of a gang plow of such combination character, that by some changes, readily made, it could be changed from a breaking to an ordinary plow, or from the latter to the former. Plaintiff had dealt with the defendants for quite a period of time, though there was no contract existing between the parties when the particular transaction occurred. Defendants knew plaintiff was the manufacturer of a combined gang plow, which was scheduled in its advertising literature with which defendants were familiar. They had been accustomed to serve plaintiff as sales agents under contracts which expressly, or by necessary inference, or both, negatived liability as warrantor of any of their machinery, except as to breakage from unsuitable material or workmanship. Although the season contract expired before the plow in question was ordered, defendants knew it was the custom of trade on plaintiff's part not to accompany sales of goods with warranty, except as indicated. Before the particular transaction they had been importuned by plaintiff's agents to sell some of its gang plows. Defendants ordered one for one of their customers. Such

customer informed the defendants what he desired, and it was agreed that they should obtain for him one of plaintiff's make of gang plows of the size and character suggested. Pursuant thereto defendants ordered the plow, intending to obtain one of such character of plaintiff's manufacture. The order was by letter in this form:

"Omro, Wisconsin, Oct. 28, 1907.

"*La Crosse Plow Company,* La Crosse, Wis.

"GENTLEMEN: We have a customer that wants a foot-lift gang plow with two bottoms, one for stubble and the other for prairie breaker. He has a large tract of land in North Dakota, and 180 acres here, and wants to use it here this fall and ship it to North Dakota in the spring. 14-inch with one extra share each for the stubble bottom and two extra shares for the sod bottom. Please send this as soon as possible and give us the best terms possible.

"Yours truly,

"GEORGE W. BROOKS & SON."

The plow was forwarded and in due course delivered to the customer. There was evidence tending to show that it was not suitable for breaking sod land; that not being adaptable therefor as well as for ordinary plowing, it was useless to the customer; that it was accordingly returned to defendants and they offered to return it to plaintiff, claiming credit for the amount charged therefor. There was no evidence to sustain the claim that the plow was sold with express warranty, but the court held, under the circumstances, that there was an implied warranty that the implement was reasonably suitable for the work for which it was purchased, and submitted the cause to the jury to pass upon the question of whether there was a breach of such warranty and, if so, to assess damages for the breach. The jury found in defendants' favor, assessing their damages at the full sale value of the plow and its accessories, and adding to the finding "and the plow to be subject to the order of the plaintiff."

Plaintiff claimed judgment on the undisputed evidence for

the full amount of its demand, but the court, on motion, granted judgment for such amount less the charge for the plow and its accessories, and in the judgment established the status of the title thereto in plaintiff.

For the appellant there was a brief by *McConnell & Schweizer,* and oral argument by *C. H. Schweizer.*

Wilbur E. Hurlbut, for the respondents.

MARSHALL, J. The judgment in this case is rather novel. We speak of it in passing, so it may not be taken as a precedent worthy of being followed. Neither jury nor the court had anything to do with the title to the plow. The judgment, as the trial court viewed the matter, should simply have been for the amount recoverable. The action was not *in rem* in any sense. It was a plain action upon contract for balance of account subject to any valid counterclaim for breach of warranty. It were better to have kept all other matters out of the record.

The only material question upon the appeal is as to whether the court erred in holding that there was an implied warranty of fitness. If not, manifestly, judgment should have been rendered for appellant for the full amount of its claim. Indeed, in such case, the cause should not have been submitted to the jury, at all, as it was correctly held that there was no express warranty and no defense by way of counterclaim or otherwise, unless defendants were entitled to the benefit of an implied warranty of fitness.

As indicated in the statement, the article ordered was a well-known and advertised implement of appellant's manufacture. Respondents' customer knew that he was to get a gang plow of that kind. Respondents engaged to obtain such a plow. In short, respondents and their customer contracted with reference to a combination plow of appellant's manufacture, and respondents ordered and obtained it.

Now it is a familiar rule that where a known, defined, and

described article is ordered and furnished, so the customer gets precisely the particular thing contracted for, there is no implied warranty that it will answer the particular purpose of the buyer. That is quite elementary. *J. I. Case P. Works v. Niles & S. Co.* 90 Wis. 590, 63 N. W. 1013; *J. Thompson Mfg. Co. v. Gunderson,* 106 Wis. 449, 82 N. W. 299; *La Crosse P. Co. v. Helgeson,* 127 Wis. 622, 106 N. W. 1094; *Logeman Bros. Co. v. R. J. Preuss Co.* 131 Wis. 122, 111 N. W. 64. There is no particular controlling significance in the use of the precise combination of words, viz.: "Where a known and defined and described article is ordered and furnished," etc., though it is so frequently used in decisions that it might be thought otherwise. The idea is that, if a person orders an article of a particular description and appropriate name in the trade, or a particular article made by a particular manufacturer, and gets it, he takes the article without implied warranty of fitness for his use. The Minnesota court puts it in this way:

"If an order be given for a specified article of a recognized kind or description, and the article is supplied, there is no warranty that it will answer the purpose described or supposed, although intended and expected to do so." *Wis. R. P. B. Co. v. Hood,* 54 Minn. 543, 56 N. W. 165.

Other courts use different language to express the same idea; *i. e.* in case a purchaser obtains the particular thing ordered as known in the trade and he does not exact any express warranty, he takes it at his peril of its being adaptable to his purpose.

Now does the fact that, in this case, respondents, in ordering the plow, informed appellant of the particular use for which it was wanted, raise, by implication, a warranty that it would prove to be suitable for that particular use, notwithstanding the general rule? The proposition stated is answered in the negative as emphatically and generally as in cases where the particular element is absent, by many de-

cisions of this and other courts. *Milwaukee B. Co. v. Duncan,* 87 Wis. 120, 58 N. W. 232; *Logeman Bros. Co. v. R. J. Preuss Co., supra; Mason v. Chappell,* 15 Grat. 572; *Whitmore v. South Boston I. Co.* 2 Allen, 52; *Seitz v. Brewers' R. M. Co.* 141 U. S. 510, 518, 12 Sup. Ct. 46.

In the first case cited the court said, quoting from a leading English case:

"Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined, and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer."

This court adding: "Where the buyer in such case gets what he bargained for, there is no implied warranty." Again the court said in the second case cited:

"If a manufacturer or dealer contracts to sell a known or described thing, although he may know the purchaser intends it for a specific use, if he delivers the thing sold there is no implied warranty that it will answer or is suitable for the specific use to which the purchaser intends applying it." *Logeman Bros. Co. v. R. J. Preuss Co.* 131 Wis. 122, 128, 111 N. W. 64, 67.

Similar language is used in all the other cases.

Indeed, the doctrine indicated is a very old one, yet it is one liable to be overlooked in the course of a trial of first instance, as it was in this case. Though the rule is so familiar that the sale of a known article upon an order for that particular thing, does not, *ipso facto,* carry, by implication, a warranty of fitness, yet, where there is the added circumstance mentioned, the idea will naturally occur to one,—not familiar with the law on the subject, or being familiar, not called upon with sufficient frequency to apply it to have it in mind at all times when challenged upon the subject,—that there should be and is a warranty of fitness. That seems to have been the case here. That there is no warranty in such cir-

cumstances, seems very plain. The trial court should so have ruled and disposed of the case, on the undisputed evidence that respondents obtained just what they ordered, by rendering judgment according to the prayer of the complaint.

By the Court.—The judgment is reversed, and the cause remanded with directions to render judgment as indicated in this opinion.

MINNEAPOLIS THRESHING MACHINE COMPANY, Appellant, vs. ASHAUER and others, Respondents.

April 8—April 26, 1910.

Judgments: Jurisdiction: Collateral attack: Foreign corporations: Service of summons on "agent:" Proof of service: Appeal: Affirmance.

1. Where a judgment is attacked years after its rendition and after the party attacking it had knowledge of it, every reasonable intendment should be made in favor of the jurisdiction.
2. The adjudication by the court, in such case, that it had jurisdiction is of strong *prima facie* effect, and the evidence of service of summons which the court had before it is entitled to most liberal construction in favor of the conclusion reached by the court.
3. The acquirement of jurisdiction over the person of a foreign corporation as authorized by subd. 13, sec. 2637, Stats. (1898), by service of summons and notice of object of action by delivering copies thereof "to any agent having charge of or conducting any business therefor in this state," constitutes due process of law.
4. The word "agent" in such section is to be construed broadly and liberally.
5. A sheriff's return showing service upon a foreign corporation by leaving copies of the summons and notice of action at an office maintained by the corporation in this state with the person in charge of such office, sufficiently shows the existence of the facts necessary to confer jurisdiction, especially where upon a subsequent collateral attack by the corporation upon the judg-

ment rendered against it no evidence is offered in contradiction of the facts stated in such return or the natural inferences therefrom.

6. If the facts necessary to confer jurisdiction actually existed jurisdiction was acquired, however imperfect the evidence of those facts then before the court; and although the record fails to show jurisdiction the necessary facts may be proved in the action in which the judgment is attacked.

7. Where a judgment of the lower court is correct it should be affirmed irrespective of the grounds on which it was predicated.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

On May 3, 1894, one George Binder was the owner of the premises involved, and had within two years theretofore made three certain mortgages thereon in the following order: one for $1,000 to Sieben; one for $1,770 to John Binder; and one for $1,427 to this plaintiff. At said date suit was commenced by Sieben to foreclose her mortgage, naming as defendants both John Binder and the plaintiff, together with George Binder and other defendants not now material. The summons was attempted to be served on all of the defendants in that action, including the plaintiff in this, a foreign corporation having its principal offices in Minneapolis, Minnesota, as to whom the sheriff's return showed service as follows:

"By serving the same on Henry Hardgrove, its managing agent for the state of Wisconsin, in its office in the city of Fond du Lac, by then and there leaving in the office of said company true copies thereof, in the presence of Richard McRoy, who was then and there in charge of said office, and who was then and there a person of suitable age and discretion, to whom the contents thereof were explained."

All defendants defaulted in that action and judgment of foreclosure was entered therein June 30, 1904, reciting due and personal service upon all of the defendants. On September 9, 1895, the mortgaged premises were sold by the sheriff in pursuance of the judgment to Peter Ashauer for

$2,175, a sheriff's deed in ordinary form made, a report filed, together with a sum of surplus money, and the report of sale duly confirmed by order of the court, whereupon, on the 26th of September, 1895, Mary Binder, as holder of the second mortgage, made application for payment to her of the surplus money. Notice of such motion was served by mail upon the plaintiff in this action on September 26, 1895, and the surplus money was ordered paid to Mary Binder.

Since the sheriff's deed Peter Ashauer has occupied and improved the premises, and plaintiff has done no act suggestive of a purpose to claim any rights in said real estate. It has collected a part of its mortgage debt from the debtor. George Binder, but not all. The present action is an ordinary statutory one for foreclosure, alleging merely that Ashauer and his wife claim some interest or lien, which interest or lien, if any, is subsequent to the lien of plaintiff's mortgage and subordinate and subject thereto. The trial court, finding substantially the above facts, decided that Ashauer's title had become complete by lapse of time and that plaintiff, by reason thereof and of its laches, could not maintain this action, and rendered judgment dismissing the complaint, from which the plaintiff appeals.

For the appellant there was a brief signed by *Gerrit T. Thorn,* attorney, and *H. I. Weed,* of counsel, and oral argument by *Mr. Thorn.*

For the respondents the administratrix and minor heirs of Peter Ashauer, deceased, there was a brief by *Wigman, Martin & Martin,* and oral argument by *J. H. M. Wigman.*

DODGE, J. Any right of plaintiff to maintain this action is dependent on its contention that it never became personally subject to the jurisdiction of the court in the former foreclosure action where it was named as defendant. In case of a collateral attack upon so solemn a record as this judgment, made years after its rendition and after it is obvious that the

party seeking to attack it had knowledge of it, every reasonable intendment should be made in favor of the jurisdiction so assumed and exercised. The very adjudication by the court that it had jurisdiction is of strong *prima facie* effect, and only by clear negation of the facts necessary to confer jurisdiction should it be ignored. Of course, if the record itself discloses that the sole and only evidence of service which the court had before it negatives the jurisdiction, then no adjudication by the court is conclusive, but the evidence of such service is entitled to most liberal construction in favor of the conclusion reached by the court in its judgment in case of collateral attack. *Miller v. Brenham,* 68 N. Y. 83; *Ill. S. Co. v. Dettlaff,* 116 Wis. 319, 93 N. W. 14. In the Sieben foreclosure case this foreign corporation was claimant of a lien upon property in Wisconsin, and for the purposes of barring and foreclosing that lien the court of course had full jurisdiction of the subject matter and might obtain jurisdiction of the person by any means prescribed by our statutes consistent with due process of law. *Moyer v. Koontz,* 103 Wis. 22, 79 N. W. 50; *Pennoyer v. Neff,* 95 U. S. 714; *Fond du Lac C. & B. Co. v. Henningsen P. Co.* 141 Wis. 70, 123 N. W. 641. At that time, as now, our statute authorized the acquirement of jurisdiction over the person of a foreign corporation such as this by service of summons and notice of object of action, by delivering copies thereof "to any agent having charge of or conducting any business therefor in this state." Subd. 11, sec. 2637, S. & B. Ann. Stats. (1889); subd. 13, sec. 2637, Stats. (1898). This satisfies due process of law. *Fond du Lac C. & B. Co. v. Henningsen P. Co., supra.* That the word "agent" is to be construed broadly and liberally is evinced by the context. It is used in contradistinction to the words "chief officer," "vice-president," "secretary," "cashier," "treasurer," "director," or "managing agent." Further than this, the same section indicates a policy of broad liberality in enabling personal jurisdiction over foreign corpora-

tions where the subject matter is properly within the jurisdiction of our courts. For example, railroads may be reached by service upon any station, freight, or ticket agent; sleeping or hotel car companies, by service upon any person having charge of car. Subd. 6, 7, 8, sec. 2637, S. & B. Ann. Stats.

Such being the law, the evidence of service before the court in the former foreclosure action was, as stated, the leaving of summons and notice of object of action at the office of the company maintained at Fond du Lac with the person in charge of said office. By clear implication this return contains an assertion that the threshing machine company did maintain an office at Fond du Lac, which we can have no doubt is "business" within the meaning of the section above quoted. It also declares that the person with whom the summons was left did "have charge of said office," which by obvious implication asserts that he had charge of such business. Thus we think that by fair judicial construction the facts necessary to confer jurisdiction were shown to exist, especially when, as here, said foreign corporation, being present, offered no evidence in contradiction of either the facts stated or the natural inferences therefrom. If the maintenance of the office was not of such a character as to constitute business in this state, or if the relation of McRoy, the person served, thereto was not such as to constitute him an agent in charge of business, those facts were entirely within the knowledge of this appellant, and its failure to make any contradiction was itself a fact from which might have been inferred their existence. If the facts necessary to confer jurisdiction did exist, jurisdiction was acquired, however imperfect the evidence of those facts before the court in the Sieben case. *Schmidt v. Stolowski,* 126 Wis. 55, 61, 105 N. W. 44; *Zahorka v. Geith,* 129 Wis. 498, 504, 109 N. W. 552. Hence, although that record had failed to disclose jurisdiction, yet if the facts were proved in this action the judgment in the former was equally conclusive on the merits.

We are satisfied that the record upon this appeal does disclose affirmatively jurisdiction over the person of this plaintiff in the former foreclosure action and the consequent bar of all appellant's rights in the mortgaged premises, so that judgment dismissing its complaint was correct and should be affirmed irrespective of the grounds upon which such action was predicated by the trial court.

By the Court.—Judgment affirmed.

CREAM CITY MIRROR PLATE COMPANY, Respondent, vs. COGGESHALL and another, imp., Appellants.

April 8—April 26, 1910.

Corporations: Pledge of stock: Waste of assets: Rights of pledgee and creditors: Liability of directors: Action, by whom brought.

1. One taking corporate stock as security for a loan to a person who practically controls the corporation is entitled to have his security protected from fraudulent dissipation before the debt matures, even though it does not appear that the debt will not otherwise be paid at maturity.
2. General creditors of the corporation have the same right if their interests are being jeopardized.
3. If in such a case the assets of the corporation have been wasted because of a fraudulent breach of trust on the part of its directors, such directors are personally responsible for the loss.
4. Where, after such waste has occurred, the control of the corporation passes into friendly hands, the action to compel restoration of the assets by those responsible for the waste may properly be brought in the name of the corporation, rather than in the name of a creditor or of a person holding its stock as security.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is an appeal from an order overruling a general demurrer to the complaint. The complaint in substance alleges that on and prior to January 7, 1906, the net assets of the

plaintiff corporation exceeded $54,000 and that all of the stock therein was owned by John M. Goetzinger and his wife and daughter; that on January 3, 1906, it was agreed between Goetzinger and the defendant Donahue that the capital stock of the company should be increased to $50,000, and that Goetzinger should sell and assign all of said stock to Donahue in consideration of the payment of $50,000, $20,000 of which amount was to be paid in cash and the remainder in six equal annual instalments, the deferred payments to be evidenced by promissory notes; that the payment of such notes should be secured by an assignment from Donahue to Goetzinger of $40,000 of the capital stock of said company to be issued to said Donahue, such stock to be held by said Goetzinger until all the notes were fully paid; that it was further agreed between the parties that Goetzinger should be elected a director and treasurer of the corporation and act in an advisory capacity and countersign all checks and obligations for the payment of money, and that such employment should begin January 2, 1906, and end when the notes given him by Donahue were fully paid, and that he should be paid a salary of $1,800 per year; that pursuant to such agreement the capital stock was increased and Goetzinger was elected to the offices specified; that on January 6, 1906, Donahue paid Goetzinger $20,000 in cash and delivered his notes for $30,000 as agreed upon, and there was then issued to Donahue $48,900 of the capital stock of the corporation, to Goetzinger $100, and to one *Coggeshall* $1,000; that the stock issued to *Coggeshall* was issued at the request of Donahue; that of the stock issued to Donahue $39,900 was eventually transferred and assigned to Goetzinger as collateral security for the indebtedness of $30,000; that there was also issued to Goetzinger one share of stock of the face value of $100 as collateral security for the payment of said notes; that the agreement as to the employment of Goetzinger and the salary which he should receive was reduced to writing on January 6, 1906; that on

February 1, 1907, Donahue sold $5,000 of the capital stock of said corporation to the defendant *Schroeder,* and stock to that amount was legally transferred on the books of the company to said *Schroeder.* On information and belief the plaintiff alleges that Donahue guaranteed *Schroeder* against loss of the moneys paid for said stock; that at the annual election of officers held on the 1st day of February, 1907, Donahue, *Coggeshall,* and *Schroeder* were elected directors; that on said day, without just cause, the directors unanimously passed a resolution dispensing with the services of Goetzinger as treasurer, and thereafter and until April 1, 1909, combined and confederated together to exclude, and did exclude, Goetzinger from all participation in the affairs of the plaintiff corporation; that on said last-named day the defendants ceased to be directors and officers of the company, and John M. Goetzinger, his wife, and daughter were elected officers and directors in their places; that three of the notes given by Donahue to Goetzinger have been paid, but those due January 6, 1910, 1911, and 1912 are unpaid; that Goetzinger has at all times owned said notes and at all times held and still holds $40,000 of the stock of the plaintiff as collateral security for the payment of said notes; that so long as Goetzinger was retained as treasurer and financial manager the business was profitably conducted, but thereafter the business was conducted at a loss, so that by the end of the year 1908 the capital stock was impaired to the extent of over $11,500; that after Goetzinger was excluded from participation in the affairs of the company and while its capital stock was impaired by its losses, the defendants, acting as directors and officers of the corporation, fraudulently, knowingly, and wilfully authorized and permitted the defendant Donahue to withdraw and take a large sum of money from the corporation and to devote the same to his personal use, and that the amount so taken exceeded $13,000; that on December 22, 1908, at a special meeting of the board of directors of said

corporation at which all of the defendants were present, said Donahue was authorized to borrow the sum of $12,450 from the corporation, giving therefor his unsecured note without interest; that with the knowledge and consent of all the defendants said Donahue secured from said corporation the sum of $12,450 in exchange for his note, and that at such time plaintiff owed debts in a sum exceeding $22,000; that the defendants had mismanaged the business and wasted the property, so that when the aforesaid sum of money was withdrawn by Donahue the plaintiff was left without means to pay its liabilities, and its entire assets were worth but little, if anything, above its liabilities; that shortly before the defendants ceased to be directors, the National Exchange Bank, to which the corporation was indebted in the sum of $19,000, threatened bankruptcy proceedings, and that to avoid such proceedings said Goetzinger paid to said bank all of its claim and took an assignment thereof; that during the years 1907 and 1908 Donahue, with the knowledge and consent of his co-directors, withdrew large amounts of money from the corporation for the purpose of paying the expense of litigation then pending between him and Goetzinger; that at the times the moneys were taken and permitted to be taken by Donahue he was wholly insolvent, which fact his co-directors well knew; and that they also knew that said moneys were being withdrawn and taken by Donahue for his own uses and purposes and not for the use of the corporation.

The relief prayed for is that the defendants be compelled to pay into the treasury of the corporation all moneys taken therefrom by Donahue, and that it have such other and further relief as may be just.

For the appellants there was a brief signed by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles, Jr.,* of counsel, and oral argument by *J. V. Quarles, Jr.*

For the respondent the cause was submitted on the brief of *Frank M. Hoyt.*

BARNES, J. The question presented to this court is: Does the complaint state a cause of action? It may be that the plaintiff is asking relief to which it is not entitled, and that facts exist which would deter a court of equity from granting any relief, but if they do exist they are not before us. The complaint shows that Goetzinger held four fifths of the capital stock of the corporation as collateral security for the payment of an indebtedness amounting to $15,000, which indebtedness was incurred by the defendant Donahue in reference to the purchase of the corporate stock and property of the plaintiff from Goetzinger; that Donahue, who was insolvent, was permitted by his co-directors to borrow $12,450 from the corporation for his own personal use, giving a worthless note therefor, due in three years from its date without interest, and that all the directors knew that Donahue was insolvent when the loan was made; that the corporation was thereby left without means to pay its debts; and that its assets amounted to little, if anything, more than its debts.

The law would be very inefficient if it did not afford to the holder of the collateral protection against the squandering of his security by any such means. It would be just as inefficient if it did not afford a like protection to creditors of the corporation. It is no answer to the facts alleged to say that the Donahue notes may be paid as they mature. Goetzinger is entitled to have his security protected from fraudulent dissipation in the meantime. If the corporation could take the worthless notes of Donahue due in three years for the money paid him, it could take notes maturing in ten years. A party taking corporation stock as security for a loan is not obliged to permit his security to be squandered by the debtor who practically controls the corporation because perchance the debt will be paid at maturity. The security having been wasted, the creditor should have the right to compel those responsible for the waste to make reparation. The general creditors of the corporation might exercise the same right if

their interests were being jeopardized and they so demanded. The complaint shows that a large sum of money was lost to the corporation because of a fraudulent breach of trust on the part of its directors. For such a loss the recreant officers are personally responsible. Sec. 3237, Stats. (1898); *Gores v. Day,* 99 Wis. 276, 74 N. W. 787; *Cunningham v. Wechselberg,* 105 Wis. 359, 81 N. W. 414; *Killen v. Barnes,* 106 Wis. 546, 82 N. W. 536; *Consolidated V. Works v. Brew,* 112 Wis. 610, 88 N. W. 603; *Seering v. Black,* 140 Wis. 413, 122 N. W. 1055. Nothing is said in *Edler v. Hasche,* 67 Wis. 653, 661, 31 N. W. 57, or in *Whorton v. Webster,* 56 Wis. 356, 371, 14 N. W. 280, that is in conflict with the views here expressed. Subd. 2, sec. 3237, Stats. (1898), expressly authorizes the institution of such an action as is here brought against the directors of a corporation for the restitution of funds lost through their mismanagement. The control of the corporation having passed into friendly hands, and the purpose of the suit being to restore its assets by compelling money to be paid back into its treasury by those who were responsible for its wrongful withdrawal, the action was properly brought in the name of the corporation rather than in the name of a creditor of the corporation or of Goetzinger. *Doud v. W., P. & S. R. Co.* 65 Wis. 108, 25 N. W. 533; *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 256, 75 N. W. 964; *Franey v. Warner,* 96 Wis. 222, 227, 71 N. W. 81, and cases cited.

By the Court.—Order affirmed.

L. STRUEBING COMPANY, Respondent, vs. MERCHANTS DESPATCH TRANSPORTATION COMPANY, Appellant.
SAME, Appellant, vs. SAME, Respondent.

April 9—April 26, 1910.

Carriers: Damage to goods: Liability: Evidence.

1. Where goods were delivered to a carrier in good condition and were damaged in transit while in its possession through causes for which the carrier failed to show that it was not responsible, the carrier is liable for the damage.
2. Where goods when received by the consignee were found to be damaged by water, a receipt given when they were delivered to the carrier, reciting that they were apparently in good condition, with some other evidence corroborative of such recital, was sufficient to sustain a finding by the court that the goods were in good condition when shipped, notwithstanding evidence that it rained on that day at the place of shipment.

APPEALS from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This action was commenced to recover for damage to goods while in transit from New York to Oshkosh. The action was commenced against the Pere Marquette Railroad Company and the Wisconsin Central Railway Company and the *Merchants Despatch Transportation Company,* and discontinued as to the former companies. The complaint charges that on the 24th day of August, 1901, the goods in question, two cases of clothing of the value of $1,400, were deposited with the defendant at New York for carriage over its line from New York to Oshkosh, Wisconsin, for a reasonable reward, and that it agreed to safely carry the same, but failed to do so, in consequence of which they became wet and damaged to the amount of $300.

The case was tried before the court without a jury, and the following findings of fact and conclusions of law made: That the plaintiff is a domestic corporation engaged in the

mercantile business in Oshkosh, Wisconsin; that on the 24th day of August, 1901, J. Wener & Co., of the city of New York, delivered to defendant, at the city of New York, for carriage over its line to the city of Oshkosh, Wisconsin, two cases of boys' and youths' clothing, the subject of this action, and the property of the plaintiff, of the value of $1,342, and the defendant agreed to safely transport the same as a through shipment of freight, as the same were billed, over its lines from New York to Oshkosh, Wisconsin, for a reasonable reward; that at the time of the receipt of said goods at New York said goods were in a good merchantable condition and were so receipted for by the defendant; that the defendant transported said goods over its line by way of various railroads to the city of Ludington, Michigan, by way of Detroit, Michigan, and by way of steamer from Ludington to Milwaukee, Wisconsin, and by way of the Wisconsin Central Railway from Milwaukee to Oshkosh, Wisconsin, the destination of said goods; that on the 31st day of August, 1901, said goods arrived in Oshkosh and were left at the freight depot of the Wisconsin Central Railway in the care of the defendant, at the plaintiff's request, until the 6th day of September, 1901; that on the 1st day of September, 1901, the plaintiff paid the freight charges demanded by defendant for the carriage of said goods; that on the 6th day of September, 1901. said two cases of clothing were delivered to plaintiff, the contents of one case being in a thoroughly water-soaked condition from outside to center of case, the garments badly discolored by water, buttons and buckles rusty, and the clothing musty and moldy, the garments at the outer edge of the case being somewhat dried out by the heat of the season, and that by reason of such water soaking, rust, must, mold, and discoloration said goods were badly damaged to the extent of $115.50, and that interest on said sum at the rate of six per cent. per annum since the commencement of this action is $15; that said damage to said case of clothing occurred while the same was

in course of transit between New York and Oshkosh and while in the possession of the defendant as such common carrier, and through causes for which the defendant has failed to show that as such common carrier it is not liable.

As conclusions of law the court found that the defendant is liable to plaintiff for and on account of said goods to the extent of the difference between the value thereof before and after said damage, which is the sum of $115.50; that the plaintiff is entitled to interest on said sum at the rate of six per cent. per annum from the time of the commencement of this action, which is the sum of $15; that the plaintiff is entitled to judgment against the defendant for the sum of $130.50 damages and the costs and disbursements of this action.

Judgment was rendered upon the findings in favor of the plaintiff against the defendant. Both parties appealed from the judgment; the plaintiff claiming that the court should have found in its favor for $339, and the defendant claiming that the evidence was not sufficient to support the findings giving the plaintiff judgment for any amount.

F. V. McManamy, for the plaintiff.

For the defendant there were briefs by *Eaton & Eaton,* and oral argument by *F. J. Eaton.*

KERWIN, J. There is no serious dispute upon the law in this case. The court found that the plaintiff contracted with defendant to carry the goods in question safely from New York to Oshkosh for a reasonable reward, and that the goods were delivered to defendant as a common carrier in good condition and were damaged while in its possession in transit from New York to Oshkosh, and through causes for which defendant failed to show that as such common carrier it was not liable. Upon such facts the defendant is liable for the damages. *J. H. Cownie G. Co. v. Merchants' D. T. Co.* 130 Iowa, 327, 106 N. W. 749; *Merchants' D. T. Co. v. Bloch Bros.* 86

Tenn. 392, 6 S. W. 881; *John Schroeder L. Co. v. C. & N. W. R. Co.* 135 Wis. 575, 116 N. W. 179; *Blade v. C., St. P. & F. du L. R. Co.* 10 Wis. 4; *Ohlen v. A. & W. P. R. Co.* 2 Ga. App. 323, 58 S. E. 511. But counsel for defendant argues that the proof on the question as to whether the goods were in good condition and not damaged when delivered to defendant is not sufficient to support the finding. We cannot agree with counsel in this contention. There is evidence not only by the receipt given for the goods when delivered to the effect that they were in apparent good condition, but some other evidence corroborative of the recitals in the receipt. The evidence on the part of defendant to the effect that it rained in New York on the day the goods were shipped does not establish that the goods were damaged by rain, or even exposed to rain while being delivered to defendant. But without extending this opinion with a discussion of the evidence it is sufficient to say that there is ample evidence to support the findings, and therefore the judgment must be affirmed on the defendant's appeal.

The same is true of the plaintiff's appeal. The only contention of plaintiff on its appeal is that it should have had a larger judgment. In other words, that the proof showed damage in the amount of $300. The evidence as to amount of damages was conflicting, some evidence showing $115 damages and some tending to show greater damages; but the finding of $115 damages is supported by sufficient evidence and therefore cannot be disturbed.

By the Court.—The judgment of the court below is affirmed on both appeals.

MAYFIELD and another, Plaintiffs in error, vs. THE STATE, Defendant in error.

April 9—April 26, 1910.

Criminal law: Assault by several persons: Continuous purpose: Liability of persons aiding: Separate trials: Evidence: Admissions: Instructions to jury: Immaterial errors.

1. Where, in pursuance of a common design to compel an accused person to confess, several others took part in an assault upon him, and the unlawful purpose and action were continuous, although not all were present during the whole time, all those aiding, encouraging, or inciting the assault at or immediately prior to the time of its commission, and who were present when it was committed, are liable as principals.
2. In such a case it is within the discretion of the trial court whether to grant separate trials.
3. Where several persons are prosecuted for assault with intent to do great bodily harm or for assault and battery, even in the absence of proof of conspiracy admissions of one defendant may be received against him if the court then rules that this is the only purpose for which they are received and later instructs the jury that the admission of one defendant is not evidence against any other defendant but may be considered as against the person making the admission.
4. Where several persons are prosecuted for assault with intent to do great bodily harm but are convicted of assault and battery only, alleged errors in the instructions relative to the greater offense are immaterial.

ERROR to review a judgment of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

For the plaintiffs in error there was a brief by *Masters, Graves & Masters* and *G. M. Perry,* and oral argument by *Mr. Perry.*

For the defendant in error there was a brief by the *Attorney General* and *Thorwald P. Abel,* district attorney, and oral argument by *Mr. Abel.*

TIMLIN, J. The plaintiffs in error, hereinafter called defendants, were, with three others not before this court, pro-

ceeded against for assault with intent to do great bodily harm upon one Allen, and convicted of assault and battery. Defendants contend that the court erred (1) in refusing to grant them a separate trial; (2) in refusing to discharge the defendants; (3) in refusing to require the state to elect; (4) in rulings upon evidence; (5) in giving and refusing instructions.

Allen was a man about fifty-seven years of age, a vagrant who drifted into the village of Cataract and was hanging around *Mayfield's* saloon and sleeping in his barn, where Baumel and Johnson, who also slept in this barn, reported that there was stolen from them while they slept a watch and some money. According to testimony on the part of the state, *Mayfield* with others came into Masterson's saloon, found Allen there. *Mayfield* accused him of this theft, laid hands on him, shook him. Masterson forbade anything further in his saloon, whereupon *Mayfield* took Allen out into the street and said: "Let us kill the ———. Let us make him dig up." The others who were with *Mayfield* then assaulted and beat Allen for the purpose of making him confess. *Hebron* from a nearby hotel heard this fracas in the street and came over. *Mayfield* retired some little distance. Allen by this time was severely beaten by several men in this crowd and lay on the ground, while the blows which were administered to him and the oaths and vulgar language could be heard for a distance. Finally Allen called for *Mayfield* and said he would confess to him. *Mayfield* came in response and said: "If you have got the watch give it up; . . . tell where it is, and I will see that the boys won't hurt you." Allen then went to the barn with the crowd, including *Mayfield* and *Hebron,* and showed them where the watch which he had stolen was secreted, and *Mayfield* then urged him to give up the money and threatened him with violence, and then leaving Allen in the hands of the others of the assaulting party left the barn and commenced to look elsewhere for the

money. The assaults upon Allen in the barn continued, *Hebron* remaining there. After a little time *Hebron* left, was absent a few minutes, and returned. The attacking party placed a rope around Allen's neck and threatened to hang him, also to drown him, and pulled on the rope. While the rope was around his neck *Hebron* and one Davis stripped Allen of his shoes and clothing, except a shirt and vest. Allen was bleeding, bruised, and exhausted, and his condition appeared alarming, when one of the assaulting party said: "Is the son-of-a-b—— dead?" *Hebron,* who is a physician, felt of and timed Allen's pulse, and said, "He is all right." After this Allen was taken down from the barn by the attacking party into the street and it was said they were going to drown him. *Hebron* went along with them at a little distance behind, and soon after they reached a point in the street near the saloons *Mayfield* found the missing money in the sand or dust of the street. This was three hours or more from the time they first attacked Allen. They then let Allen go, brought him before a justice of the peace the next morning, had him fined $1 for something, and he left. *Hebron* held a light part of the time while the other members of the party were badgering or assaulting Allen and he also afterwards admitted to one Bussby participation in the affair. *Hebron* also took around an agreement in writing the next morning to the effect that the assaulting party should all stand together in the case and pay the fine of any one who was found guilty.

There is confessedly much evidence to the contrary of the above, but the foregoing was before the jury, and they must have found it to be true when they convicted the defendants. The learned counsel for the defendants first considers that there were three several and separate crimes, one in the saloon, one in the street, and one in the barn, and that each of the accused must be adjudged by his presence at or participation in either of these affrays, and in this way has worked

out quite an ingenious argument in favor of his clients to support his first three assignments of error. But we cannot take this view of the evidence. The state had the right to treat the whole transaction, which was continuous in its object and purpose and in its restraint upon Allen and in its unlawful acts, as one transaction. The persons associated in this crime did not all strike or assault Allen, and the blows and assaults were interrupted or suspended from time to time for the purpose of urging Allen to confess or hearing his confession or moving him from place to place, but the continuity of unlawful purpose and action persisted throughout the entire transaction. *Hilmes v. Stroebel,* 59 Wis. 74, 17 N. W. 539; 12 Cyc. 186; *Rhinehart v. Whitehead,* 64 Wis. 42, 24 N. W. 401. It was discretionary with the trial court under these circumstances whether to grant a separate trial. *Emery v. State,* 101 Wis. 627, 78 N. W. 145. We do not think there was any abuse of that discretion shown.

The principal reason urged in support of the assignment of error relating to rulings on evidence is that alleged confessions or admissions of *Hebron* could not be competent as against *Mayfield,* nor those of Young against either, but that is answered by the fact that the court, by ruling and instruction to the jury, limited the evidence of admissions to the person making the admission, and ruled that such admission should not be considered in determining the guilt or innocence of any other defendant.

The instructions relative to the offense of assault with intent to do great bodily harm need not be considered, because the defendants were acquitted of that offense by being found guilty of assault and battery.

The case was fairly submitted to the jury upon instructions substantially to the effect that if any one of the defendants did assault, beat, bruise, and injure Allen, and either or any of the other defendants were present aiding, encouraging, or inciting this assault, the latter were aiders and abettors

and liable as principals, but that mere presence at such an assault did not render one liable who had done no act to countenance or approve what had been done by those unlawfully engaged. We think there was evidence from which the jury might properly infer that both *Mayfield* and *Hebron* aided and abetted the unlawful assault upon and battery of the man Allen, and that no substantial error intervened in the proceedings below, and the judgment must be affirmed.

By the Court.—Judgment affirmed.

BEILFUSS, Plaintiff in error, vs. THE STATE, Defendant in error.

April 9—April 26, 1910.

Criminal law: Abandonment of wife and children: Liability for support of children in custody of wife: Instructions to jury: Misstatement of evidence: Arguments of counsel: Harmless errors.

1. If a father has the ability to maintain his minor children, his offer to support them if surrendered to his custody by his wife does not relieve him from liability for their support, even though they are improperly detained from him by the wife.
2. Reviewing the evidence at length in the charge to the jury, even though not advisable, is not error if the evidence is stated correctly.
3. Inadvertent misstatements in the charge to the jury as to what the evidence tends to prove, promptly called to the attention of the court and corrected by him so that the jury could not have been misled or influenced thereby, do not warrant a reversal of the judgment.
4. Where the district attorney denied having made a statement in argument attributed to him by defendant's counsel, and the court, not knowing whether he made it or not, instructed the jury to disregard it if made, no error is shown.

ERROR to review a judgment of the county court of Clark county: OSCAR W. SCHOENGARTH, Judge. *Affirmed.*

Geo. B. Parkhill, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *Emery W. Crosby,* district attorney, and oral argument by *Mr. Crosby.*

BARNES, J. The plaintiff in error, hereinafter called the defendant, was convicted under sec. 4587*c,* Stats. (1898), as amended by ch. 131, Laws of 1905, of the offense of abandoning his wife and two minor children. Such of the errors assigned as merit consideration will be discussed in the order in which they were presented to the court.

1. It is contended that the court erred in giving the following instruction to the jury:

"If you find that the defendant has sufficient ability to maintain or to earn the means with which to support the children, his offer to support them on their surrender to his custody by the wife does not relieve him from liability for their support, even if they are improperly detained from him by the wife, since he can obtain custody of them, if entitled to it, by appropriate legal proceedings."

Facts were proven on the trial to which the instruction was applicable. It seems to be entirely in harmony with what is said in *Zilley v. Dunwiddie,* 98 Wis. 428, 74 N. W. 126. and we entertain no doubt that the instruction is good law. The elder of the children was under the age of four years at the time of the trial. The younger was less than two years of age. The children should not be permitted to suffer even if the circumstances were such that the father might have been able to procure their custody in a legal way. He should either resort to his legal rights or suffer the consequences which the law very properly imposes upon him.

2. It is next urged that the court erred in that in his charge he misstated the evidence to the prejudice of the defendant. The court reviewed the evidence at much greater length than was necessary or perhaps advisable. The defendant cannot

complain of this so long as the evidence was stated correctly. His requested instructions covered eight or ten pages of typewritten matter and reviewed the evidence with much detail. The court, in delivering his charge, inadvertently made two misstatements of what the evidence tended to prove. His attention was promptly called to such errors by the counsel in the case. The action of the court in reference to the mistakes made was such as to leave no doubt in our minds that the errors were corrected and that the statements complained of could not have influenced the jury, particularly in view of the fact that counsel on both sides were agreed that the facts stated by the court, and in reference to which complaint is made, were not warranted by the evidence. Neither do we regard the alleged misstatement as being sufficiently prejudicial to warrant a reversal of the judgment.

3. It is urged that the judgment should be reversed because of improper argument to the jury by the district attorney. The latter denied making the statement attributed to him by the defendant's counsel. The court did not know whether he made it or not, but instructed the jury to disregard it if it had been made. We fail to see where the record presents any error in this regard, or where there is any exception to raise the alleged error.

4. It is also argued that a verdict should have been directed because of the failure of the proof to show that an offense had been committed. We have examined the evidence and feel satisfied that it was ample to warrant a conviction.

5. Of the two remaining errors argued, one is not well assigned and the other is not well taken and calls for no discussion.

By the Court.—Judgment affirmed.

LEPLEY, Respondent, vs. ANDERSEN, Appellant.

February 23—May 24, 1910.

Evidence: Parol agreement varying writing: Fraud: Degree of proof required: Appeal: Verdict, when disturbed: Instructions to jury: Exceptions.

1. A distinct oral agreement which ordinarily could not be shown to vary or contradict a written contract between the parties may be so shown as a matter of defense to a dishonest or fraudulent claim under the writing.
2. The foregoing rule should not be applied except in a clear case, and the party alleging the fraud must establish it with that degree of certainty which is produced by clear and satisfactory evidence.
3. The expressions "clear and satisfactory evidence" and "clear, satisfactory, and convincing evidence," used in defining the degree of proof required to establish fraud, are not to be considered as different in meaning.
4. The finding of a jury approved by the trial court will not be disturbed on appeal unless it appears to be unwarranted in any reasonable view of the evidence, giving due weight in its favor to the fact that the jury had the advantage of observing the manner of the witnesses while testifying.
5. Where, upon the question whether defendant's use of a written contract was dishonest and fraudulent, the testimony of the two interested parties was in direct conflict, both being apparently equally credible and neither corroborated, except that the writing itself accorded with defendant's claim, and the jury were not properly instructed that the burden was upon plaintiff to establish the fraud by clear and satisfactory evidence, a verdict in plaintiff's favor was not warranted by the evidence.
6. The judgment is reversed in such case because of the probability of injustice to the defendant if the verdict were permitted to stand, although he did not except to the instructions given on the subject of fraud or request the giving of other instructions properly stating the degree of certainty with which plaintiff was bound to establish that fact.

APPEAL from a judgment of the circuit court for Rusk county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Action to recover $500, money had and received. Complaint in the usual form. The defendant answered admitting receipt of the money, but claiming that it was received

as collecting agent under an agreement that he should have half for making the collection and the right to apply the other half on a claim he had for collection for another party against the plaintiff.

Defendant established his defense, *prima facie,* by introducing in evidence a written contract between himself and a former partner on one side and plaintiff on the other, to the effect that in case the former should collect the $500 claim of one Arnold the proceeds should be disposed of as stated in the answer. Plaintiff was permitted to rebut that by evidence that the claim was put into the hands of defendant and his partner for collection upon the usual terms and that, some time thereafter, plaintiff was induced to sign the written contract by representations made by defendant that it would be used only to prevent Arnold from collecting a judgment he had charge of against the plaintiff and to avoid Arnold's disinclination to pay the claim so that any of the proceeds would go to enrich plaintiff. There was further proof on the part of plaintiff as to the services rendered in collecting the claim. The evidence as to the oral understanding that the writing should not be used according to its tenor was contradicted by evidence on defendant's part. There was also evidence in his behalf that the claim he had for collection was stale and of a class permitting fifty per cent. as a customary fee. The evidence was all one way that one half of the $500 collected was actually applied on the claim defendant and his partner had for collection against plaintiff. There was evidence tending to show that the writing corresponded to the verbal understanding. Exceptions were saved to the ruling permitting proof of the contemporaneous or prior verbal contract.

The jury, considering the case as submitted by the court, allowed defendant ten per cent. of the $500 for his services as collector and found for plaintiff in the sum of $200. Judgment was rendered accordingly with costs.

For the appellant there was a brief by *Andersen & Leahy,*

J. W. Soderberg, and *Richmond, Jackman & Swansen,* and oral argument by *S. T. Swansen.*

For the respondent there was a brief by *Thomas & Carow,* and oral argument by *J. W. Carow.*

The following opinion was filed March 15, 1910:

MARSHALL, J. The principal point made on the appeal, is that the rule permitting respondent to testify to the verbal agreement, contradicting the writing which purported to fix the rights of the parties regarding appellant's compensation, was erroneous since, by a familiar principle, a written contract cannot be varied or contradicted by evidence of verbal communications prior to the making thereof or contemporaneous therewith.

The rule invoked by counsel, like most judicial rules, is subject to exceptions. One is this: Where there is a distinct oral agreement which, under ordinary circumstances, cannot be efficiently established in the face of a written one covering the subject, or which is inconsistent therewith, for the purpose of giving effect to the former notwithstanding the latter, it may be, in an action between the parties, as a matter of defense to a claim under the writing, in case of the adverse party seeking to use such writing for a dishonest purpose. *Corbett v. Joannes,* 125 Wis. 370, 388, 104 N. W. 69; *Juilliard v. Chaffee,* 92 N. Y. 529. That is a very valuable principle in the administration of justice, yet its use is so fraught with danger of rendering written agreements less certain of fixing the rights of parties than in general they are designed to be, and danger of promoting attempts to commit fraud by varying or abrogating written contracts by verbal communications which, in contemplation of law, are merged in the former,—it should not be applied except in a clear case, and the claim of fraud should not be allowed to prevail unless established by clear and satisfactory evidence. In this respect the familiar rule applies that he who alleges fraud in a

civil action, to prevail, must establish his claim with more than that ordinary degree of certainty which suffices as to the party on whom the burden of proof rests in a civil case. That degree of certainty is something less than beyond a reasonable doubt, as in a criminal case, yet something more than mere reasonable certainty which may be grounded on a bare preponderance of the evidence; that degree which is contemplated by an instruction that the party on whom the burden of proof rests must establish the truth of his claim by a preponderance of the evidence. The distinction may be a little shadowy, yet it is believed to be substantial. At any rate, it is firmly grounded in our jurisprudence and is characterized as that degree of certainty which is produced by clear and satisfactory evidence. *Maldaner v. Smith,* 102 Wis. 30, 78 N. W. 140; *Lockwood v. Allen,* 113 Wis. 474, 89 N. W. 492; *Bowe v. Gage,* 127 Wis. 245, 106 N. W. 1074.

In the last case cited the court said, in effect, notwithstanding a mere preponderance of evidence, which, ordinarily, is sufficient upon which to base a finding of fact in favor of the party upon whom the burden of proof rests, not so when to lift that burden fraud must be established. Then the finding should not be made unless the jury are satisfied by evidence which is clear, satisfactory, and convincing. A court in submitting the issue of fact to a jury does not perform its duty without making that distinction. In respect to an instruction, as in this case, the court added:

"The instruction given would correctly enough have defined the jury's duty upon an ordinary issue of fact; but it was incomplete as a guide in passing upon fraud. . . ."

We should say, in passing, to avoid confusion because of variations in stating the rule referred to, "clear and satisfactory evidence" being used in some instances and "clear, satisfactory, and convincing evidence" in others, it is not understood here that the latter goes any further than the former. That is, to tell the jury, the claim of fraud in order

to prevail must be established by clear and satisfactory evidence, is all-sufficient, though it may be that the more emphatic expression, "clear, satisfactory, and convincing evidence," would be more likely than the somewhat milder expression—especially where fraud is claimed to avoid a written contract unquestionably executed with knowledge of its contents and with all usual formalities—to challenge the minds of jurors to the distinction between the two degrees of certainty, and the importance of holding to the higher one as the safest way of reaching a right result with the greatest practicable certainty.

The case, from the standpoint of the respondent, involved, very plainly, the conditions requiring the rule in *Corbett v. Joannes,* 125 Wis. 370, 104 N. W. 69, to be considered. On the one side there was a written contract, in plain terms, fixing the rights of the parties. On the other, there was the claim that the writing was not made for the purpose its terms would indicate; that the real contract relating to compensation for doing the work, apparently fixed by the writing, rested in parol, and that the attempt to use the writing for a purpose, not within the contemplation of the parties when it was made, was dishonest. The adversaries only, testified on the subject. Each apparently testified as positively to his claim, as the other. Neither seems to have been corroborated by any other witness or circumstance, except appellant had the advantage of the writing. That gave him the benefit of the rule casting upon respondent the burden of satisfying the jury by "clear and satisfactory evidence," or "clear, satisfactory, and convincing evidence" of the truth of his claim. The rule was peculiarly important, in that the case had to turn solely upon the question of which of the two interested parties testified to the truth. There was no opportunity for conflict consistent with good faith. One or the other must necessarily have told the truth and the other testified wilfully false. The presumption against perjury was in favor of one

as much as the other. So the jury had only differentiation between the reasonableness of the two stories and the manner of the two parties in giving their testimony. The jury had the benefit of the latter element and so did the trial court in approving of their finding as being warranted by some reasonable view of the evidence, under all the circumstances.

The manner of witnesses while testifying before a jury sometimes is a valuable guide in solving conflicts. That guide, in the very nature of things, an appellate court cannot have the benefit of, hence the rule that the finding of a jury, approved by the trial court, will not be disturbed on appeal unless it appears to be unwarranted in any reasonable view of the evidence, giving due weight in its favor to those circumstances which are legitimate aids to the jury and judge in discovering truth but are not to the reviewing court.

From the foregoing it will be seen that the rulings on the objections to evidence as to a verbal agreement having been made which was inconsistent with the writing, tending to show that the writing was put forward for a fraudulent purpose, were proper. Was the evidence to prove such purpose sufficient to warrant the jury in finding in favor of the claim of fraud? That is the serious question.

Looking at the printed record alone, it does not seem that the evidence of respondent was sufficient to outweigh the equally positive, and so far as appears, equally credible, evidence of appellant and the writing besides, so as to establish clearly and satisfactorily, or in other words, clearly, satisfactorily, and convincingly, that appellant's use of the writing was dishonest. It may possibly be, as we have seen, that circumstances existed which were entitled to weight by the jury, but which we cannot have the benefit of; and which were sufficient, if the jury so thought, to point to the requisite degree of certainty of the truth to justify finding in respondent's favor. Had the jury been carefully instructed in respect to the matter, it may be that they would not have

found as they did. It seems quite probable that they would not. Had they done so with an appreciation of the rule as to establishing fraud, it may be that the verdict could not be disturbed here, though that is not clear.

Neither counsel for the plaintiff, nor counsel for the defendant, nor the circuit judge, seems to have appreciated the distinction between proving fraud and proving any ordinary fact in issue in a civil case. The judge in the instruction, phrased by himself, informed the jury that the burden was upon plaintiff to establish his claim of fraud to their satisfaction by a fair preponderance of the evidence, instead of making it plain that he should establish it to such satisfaction by clear and satisfactory evidence.

Instructions given at the request of appellant, so far as they touched the subject at all, were in harmony with the main instruction. The court said to the jury, at the request of counsel for appellant, in effect, that the claim of fraud could not prevail unless proved with a reasonable degree of certainty.

True, counsel for appellant did not except to the instructions given on the subject we have discussed, nor request any different instruction in respect to the matter, but on the contrary, as we have seen, requested and obtained somewhat similar instructions. So appellant is in no position to complain of errors in that respect, but, in the absence of a finding, in effect that the claim of fraud was established by clear and satisfactory evidence, and there is none here, especially without evidence of some convincing evidentiary circumstance stronger than it seems probable there could have been, which could not be spread upon the record, but which must have been before the jury,—it is considered that it is too probable injustice may have been done appellant, to allow the verdict to stand. So it is the opinion of the court, that on the record as it stands, the evidence does not warrant the verdict, giving due weight, reasonably, to the manner of adversaries

before the jury, which may have, to some extent, influenced them, nor does the verdict support the judgment.

In view of the foregoing many questions discussed by counsel are immaterial. The case as it should be tried and submitted to a jury, if submitted at all, is a very simple one.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

A motion for a rehearing was denied May 24, 1910.

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ADVERSE POSSESSION.

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1. After establishment of adverse possession of land a temporary absence of the invader, such as leaving the dwelling house thereon without an occupant, while endeavoring to secure a tenant, or other temporary absence not evincing any intention of abandonment, there being no interruption of the possession by entry of the true owner, or other disseisin, does not suspend the running of the statute against such owner. *Ovig v. Morrison,* 243
2. Adverse holding is not interrupted by the hostile possessor endeavoring to settle the disputed right to the premises so as to avoid litigation, or the status of his claim affected. *Ibid.*
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6. Actual possession of a part of a tract of land under color of title extends by construction to the calls of the paper basis for the entry. *Ovig v. Morrison,* 243

7. In case of adverse possession of a tract of land under color of title, and actual adverse possession of contiguous land in connection therewith, possession extends by construction to the calls of the paper basis for the entry under the ten-year statute of limitations, while the twenty-year statute applies to the possession beyond such calls. *Ibid.*

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8. The rule of the Code is that unexplained, exclusive, continuous occupancy of land under a chain of title for the full period requisite to title by adverse possession, extinguishes the presumption of occupancy in subordination to the right of the true owner and creates a presumption of holding during such period with all the characteristics of adverse possession, subject to be rebutted by proof to the contrary, but conclusive in the absence of such proof. *Ovig v. Morrison,* 243

9. Continuous disseisin of the true owner of a tract of land by another, or others, in continuity under color of title for a period of ten years, or without such color for a period of twenty years, creates a disability in such owner to recover the land by judicial remedies and so divests him of title and vests it in his adversary, though there was, to his knowledge, no legitimate basis whatever for his adversary's claim during the statutory period. *Ibid.*

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2. Where an undertaking on appeal is executed by a foreign corporation and is not accompanied by the certificate of authority, or certified copy thereof, which by sec. 1966—34, Stats. (1898), is made equivalent to the justification required of sureties by law, the appellant may properly be allowed to supply such certificate or copy and thus perfect the undertaking, even after the time for taking an appeal has expired. *Ady v. Barnett,* 18

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5. Recitals of fact in the decision and judgment of the trial court will, on appeal, be assumed to be true where there is no bill of exceptions. *Donahue v. Gunter,* 465

6. If in such a case the facts recited sustain the judgment it should be affirmed, notwithstanding an irregularity in that the action was dismissed upon motion after the case was at issue and before it was reached for trial. *Ibid.*

7. Under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), it will not be assumed in support of a judgment that a fact not found by the jury was found by the trial court, where there is no evidence which would have warranted such a finding. *Kraczek v. Falk Co.* 570

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10. If the evidence upon an issue is conflicting, the verdict of the jury is decisive. *Lemke v. Hage,* 178

11. In an action, in form, to recover the purchase price of chattels, where the cause of action is in fact for damages for breach of the agreement to purchase, a recovery, in form, upon the theory

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12. In an action for injury to one who was struck by a falling steel rope it was not error to permit a dentist who treated plaintiff's broken teeth to state whether it would take a light or heavy blow to leave the mouth in the condition in which he found it, it being undisputed that the blow was a heavy one. *Gierczak v. Northwestern Fuel Co.* 207

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16. The finding of a jury approved by the trial court will not be disturbed on appeal unless it appears to be unwarranted in any reasonable view of the evidence, giving due weight in its favor to the fact that the jury had the advantage of observing the manner of the witnesses while testifying. *Lepley v. Andersen,* 668

Same: Subsequent appeals: Law of the case.

17. A decision on a former appeal that a statute does not violate constitutional provisions is the law of the case. *Kiley v. Chicago, M. & St. P. R. Co.* 154

18. After appeal by some of the defendants and reversal in the supreme court, upon a subsequent appeal by a defaulting defendant who did not join in the former appeal the record in the court below must be considered as if amended by the decision on the first appeal. *Cotzhausen v. Goetz,* 628

19. Where upon the first appeal the cause is dismissed as to several defendants, the record contains no support for a judgment against the last appealing defendant upon any liability which must be traced through the acts of his codefendants which are concluded adversely to the plaintiff by the decision on the first appeal. *Ibid.*

20. In such case, if there is an independent ground of liability as against the last appellant not traceable through his codefendants, the judgment will be affirmed on the later appeal. *Ibid.*

Determination and disposition of cause: Temporary alimony and suit money. See DIVORCE, 9, 10.

Same: Mandate on reversal. See MORTGAGES, 7.

21. In an action to reform a building contract and to recover the reasonable value of work alleged to have been included in the

contract by mistake, the supreme court, upon reversing a judgment for plaintiff upon the ground that he was not entitled to such relief, might properly direct that the action be dismissed upon the merits; but, a later promise by defendant to pay any loss sustained by plaintiff on the contract having been shown, the plaintiff, under the liberal rules of practice in equity, is given the right to elect, upon payment of all costs down to the date of such election, to take further evidence as to whether there was a loss on the contract, for the purpose of ending the litigation. *Grant Marble Co. v. Abbot,* 279

Costs: Taxation.

22. Costs may be taxed in the supreme court after the record in the case has been remitted to the trial court, no time limit being placed by statute on such taxation, and no modification of the judgment being involved therein. *Bouchier v. Hammer,* 527

APPURTENANCES. See EASEMENTS. EMINENT DOMAIN, 16.

ARGUMENTS OF COUNSEL. See INSTRUCTIONS TO JURY, 9.

ASSAULT AND BATTERY.

Criminal responsibility: Assault by several persons.

1. Where, in pursuance of a common design to compel an accused person to confess, several others took part in an assault upon him, and the unlawful purpose and action were continuous, although not all were present during the whole time, all those aiding, encouraging, or inciting the assault at or immediately prior to the time of its commission, and who were present when it was committed, are liable as principals. *Mayfield v. State,* 661
2. In such a case it is within the discretion of the trial court whether to grant separate trials. *Ibid.*
3. Where several persons are prosecuted for assault with intent to do great bodily harm or for assault and battery, even in the absence of proof of conspiracy admissions of one defendant may be received against him if the court then rules that this is the only purpose for which they are received and later instructs the jury that the admission of one defendant is not evidence against any other defendant but may be considered as against the person making the admission. *Ibid.*
4. Where several persons are prosecuted for assault with intent to do great bodily harm but are convicted of assault and battery only, alleged errors in the instructions relative to the greater offense are immaterial. *Ibid.*

ASSEMBLY, RIGHT OF. See CONSTITUTIONAL LAW, 8.

ASSIGNMENT OF ERRORS. See CRIMINAL LAW, 3.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 3, 4, 7, 9, 18–32.

ATTORNEYS. See INSTRUCTIONS TO JURY, 9. MORTGAGES, 7, 8.

ATTORNMENT. See TAX TITLES, 5–8.

AUTOMOBILES.

See DAMAGES, 4. NEGLIGENCE, 4. TRIAL, 5.

1. An automobile is not inherently or *per se* a dangerous machine so as to render its owner liable on that ground alone for injuries resulting from its use. *Steffen v. McNaughton,* 49

2. The owner of an automobile is not liable for injuries caused by his chauffeur's negligent operation of the machine at a time when the chauffeur was using it for his own personal and private purpose, not within the scope of his employment, and without authority or consent, express or implied, of the owner. *Ibid.*

3. Where, under his contract of employment, a chauffeur was to furnish his own meals and, impliedly, might leave the service for such time at noon as was necessary for that purpose, his employment and the relation of master and servant were temporarily suspended during such time; and if in going to his home for his midday meal he used his employer's automobile without authority or permission he was not, while so doing, acting within the scope of his employment, the circumstances not being such as to show that he was merely availing himself of a privilege impliedly granted to facilitate his labor and service or in furtherance of the employer's interests. *Ibid.*

4. One who, while driving an automobile at night, runs into a wagon which has been stopped on the proper side of the highway to permit him to pass, is guilty of negligence whether he struck the wagon by turning into it or by running on the wrong side of the highway. *Anderson v. Sparks*, 398

5. Where one driving in a wagon on a dark night, in the middle of a highway having a traveled track eighteen feet wide with a ditch on each side, turned to the right as soon as he saw the lights of an approaching automobile and stopped, leaving plenty of room for it to pass without danger, and about a minute after he saw the lights his wagon was struck by the automobile, he was not necessarily guilty of contributory negligence even if his wagon, when struck, was slightly over the center line of the highway; but the question was one for the jury. *Ibid.*

6. Questions submitted for special verdict in such case, as to whether defendant used ordinary care in handling and running his automobile at the time he was approaching and met the plaintiff; as to whether his want of ordinary care, if found, was the proximate cause of the injury; as to whether any want of ordinary care on plaintiff's part contributed to the injury; and as to the damages,—accompanied by a proper charge to the jury, fairly covered the issuable facts, and it was not error to refuse to submit other questions as to evidentiary facts, such as whether the automobile at the time of the collision was running as far to the right of the highway as was practicable, and whether the wheels of the wagon were over the center line of the highway. *Ibid.*

AWARD. See EMINENT DOMAIN, 2, 5, 8.

BAD FAITH. See ADVERSE POSSESSION, 4, 5.

BAKERIES. See CONSTITUTIONAL LAW, 12.

BALLOTS. See ELECTIONS, 1–5.

BEST EVIDENCE. See CONTRACTS, 10. DEEDS, 3, 4. EVIDENCE, 2, 3. LANDLORD AND TENANT, 3.

BILL OF EXCEPTIONS. See APPEAL, 5.

BILLS AND NOTES.

Requisites and validity. See CONTRACTS, 38.

Accommodation makers. See CONTRACTS, 24, 25. INFANTS, 2.

Negotiation.

The undisputed fact that title to the note in suit passed to plaintiff is not negatived by findings by the jury that he did not purchase the note prior to maturity in good faith and that when he procured it from the payee he had knowledge of an agreement between the payee and the makers. *Case v. Beyer*, 96

Payment. See PAYMENT, 1, 2.

BOARD OF PUBLIC WORKS. See MUNICIPAL CORPORATIONS, 1–3, 5.

BONDS. See CONTRACTS, 13. MUNICIPAL CORPORATIONS, 13–15.

BOUNDARIES. See ADVERSE POSSESSION, 4.

BRIDGES. See NAVIGABLE WATERS, 3, 4.

BROKERS.

A finding of the trial court that certain goods were sold by the defendants directly to the purchaser, and were not sold for defendants by plaintiff so as to entitle plaintiff to commissions under a trade agreement, is sustained by the evidence. *Associated Artists v. Clement*, 490

BUILDING CONTRACTS. See APPEAL, 21. CONTRACTS, 32, 41.

BUILDINGS. See FIXTURES, 3. MASTER AND SERVANT, 11, 12.

BURDEN OF PROOF. See APPEAL, 14. CONTRACTS, 34. INSTRUCTIONS TO JURY, 6, 7, 13. LIBEL AND SLANDER, 1, 3. MASTER AND SERVANT, 5. MORTGAGES, 2, 3. PAYMENT, 1.

CANCELLATION OF INSTRUMENTS. See CORPORATIONS, 2.

CAPITAL STOCK. See CORPORATIONS, 1–3.

CARRIERS.

Control and regulation. See CONSTITUTIONAL LAW, 13, 14.

Carriage of goods: Injury to goods.

1. Where goods were delivered to a carrier in good condition and were damaged in transit while in its possession through causes for which the carrier failed to show that it was not responsible, the carrier is liable for the damage. *L. Struebing Co. v. Merchants Despatch T. Co.* 657

2. Where goods when received by the consignee were found to be damaged by water, a receipt given when they were delivered to the carrier, reciting that they were apparently in good condition, with some other evidence corroborative of such recital, was sufficient to sustain a finding by the court that the goods were in good condition when shipped, notwithstanding evidence that it rained on that day at the place of shipment. *Ibid.*

Carriage of passengers. See RAILROADS, 3, 4.

CHAUFFEUR. See AUTOMOBILES, 1–3.

CLASSIFICATION. See CONSTITUTIONAL LAW, 13–15.

CLERKS OF COURTS.

1. Where, pursuant to ch. 411, Laws of 1901, a county board has fixed the salary of the clerk of the circuit court, he must account for and pay over all fees and other emoluments received by him in his official capacity. *Barron County v. Beckwith*, 519

2. The services performed by clerks of the circuit courts in proceedings to naturalize aliens under the federal statutes are performed in their official capacity as such clerks, and the fees, whether fixed by act of Congress or by state law, are fees or emoluments of the office received by the clerks in their official capacity. *Ibid.*

3. The fact that the clerks' fees in naturalization proceedings now prescribed by act of Congress differ from the fees which were fixed by the state law at the time of the enactment of ch. 411, Laws of 1901, is immaterial. *Ibid.*

4. The act of Congress, authorizing and permitting the clerks to "retain one half of the fees" collected in naturalization proceedings, refers merely to the adjustment between such clerks and the Bureau of Immigration, and does not permit clerks who are on a salary basis to hold such fees as against the county. *Ibid.*

CLOUD ON TITLE. See TAX TITLES, 9.

COLLATERAL ATTACK. See JUDGMENT, 3. PROCESS, 3.

COLLATERAL SECURITY. See CORPORATIONS, 3.

COLOR OF TITLE. See ADVERSE POSSESSION, 6–9.

COMITY. See CONTRACTS, 14–25.

COMMERCE. See CORPORATIONS, 12.

COMMERCIAL PAPER. See BILLS AND NOTES. CONTRACTS, 24, 25, 38. INFANTS, 2. PAYMENT, 1, 2.

COMMISSIONS. See BROKERS. CONTRACTS, 13.

COMMON CARRIERS. See CARRIERS. RAILROADS.

COMPETENCY. See EVIDENCE, 1, 5. HOMICIDE, 2. MORTGAGES, 4, 8. NAVIGABLE WATERS, 4. PAYMENT, 2. PROCESS, 4. WILLS, 1.

COMPLAINT. See CORPORATIONS, 5. MORTGAGES, 3. PLEADING, 1–6, 10–13. TRIAL, 1, 2.

CONDEMNATION OF LAND. See EMINENT DOMAIN.

CONDITIONS PRECEDENT. See CORPORATIONS, 1. EMINENT DOMAIN, 12. MUNICIPAL CORPORATIONS, 13. PUBLIC LANDS, 6.

CONDITIONS SUBSEQUENT. See DIVORCE, 5.

CONSIDERATION. See FIXTURES, 2.

CONSPIRACY. See ASSAULT AND BATTERY, 1, 3.

CONSTITUTIONAL LAW.

Construction of constitutional provisions.

1. A decision on a constitutional question that has long been considered the settled law of the state should not be lightly set aside, though the court as presently constituted might reach a different conclusion if the question were a new one. *State ex rel. Van Alstine v. Frear,* 320

Legislative powers and functions. See ELECTIONS, 1.

2. Legislation on the subject of elections is within the power of the legislature so long as it merely regulates the exercise of the elective franchise and does not deny the franchise itself either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial. *State ex rel. Van Alstine v. Frear,* 320

Same: Delegation of legislative power.

3. Except as authorized by the constitution the legislature cannot delegate power to make a law. *State ex rel. Van Alstine v. Frear,* 320

4. The legislature may, however, make a law to become operative on the happening of a certain contingency or on the ascertainment of a fact upon which the law makes or intends to make its own action depend. *Ibid.*

5. The question whether or not a general law shall become operative may be referred by the legislature to a vote of the electors of the state. Such reference does not involve any delegation of power to make a law. *Smith v. Janesville,* 26 Wis. 291, followed. *Ibid.*

6. As to the right of referendum, no distinction between local and general laws is recognized in our constitution, and there is no difference in principle. *Ibid.*

Same: Publication of laws.

7. Ch. 451, Laws of 1903, which declared that the provisions thereof relating to primary elections should go into effect only after being approved or ratified by the people of the state at the next general election, was a complete law when it received the executive sanction and was published in the official state paper; and publication thereof after it had been ratified by the popular vote was not essential. *Ibid.*

Right of assembly.

8. Ch. 451, Laws of 1903, providing for primary elections to nominate party candidates for office, and denying the right of the nominees of conventions, as such, to a place on the official ballot, does not abridge "the right of the people peaceably to assemble, to consult for the common good," guaranteed by sec. 4, art. I, Const. *State ex rel. Van Alstine v. Frear,* 320

Police power.

9. A reasonable police regulation is not invalid because property rights are to some extent affected by it. *Benz v. Kremer,* 1

10. It is for the legislature to determine in what cases and upon what conditions the police power may be exercised, and its determination will be deemed correct by the courts unless it appears to be clearly wrong; and the courts will also consider the ostensible purpose of a police regulation as its actual purpose unless the contrary clearly appears. *Ibid.*

11. A police regulation which in general promotes the public health will not be held unreasonable or unnecessary merely because individual cases do not require its enforcement. *Ibid.*

12. Sec. 1636—63, Stats. (Laws of 1907, ch. 486), is in the interest of the public health and is a reasonable and valid exercise of the police power. *Ibid.*

Privileges and immunities. See ELECTIONS, 6–8.

Same: Class legislation.

13. Laws governing railway carriers as a class in their relations with their employees, and subjecting them to liabilities and obligations greater than those imposed upon other employers of labor, are based upon just and proper classification and are not in vio-

lation of the XIVth amendment to the federal constitution. *Kiley v. Chicago, M. & St. P. R. Co.* 154

14. It is not essential to the validity of such laws that their operation should be confined to employees engaged in moving trains. *Ibid.*

15. Exemption of "employees working in shops or offices" from the operation of a law imposing upon railway carriers peculiar liabilities to all their other employees, is not so unreasonable a subclassification that it can be held to be beyond the power of the legislature. *Ibid.*

Due process of law. See PROCESS, 1.

Qualifications for office. See ELECTIONS, 8.

Right of petition. See ELECTIONS, 10.

CONTRACTS.

Executory contracts. See HUSBAND AND WIFE, 4.

1. If an executory vendee refuses to carry out his agreement to purchase a specified quantity of manufactured goods not identified and made specific at the time of the agreement nor thereafter before the refusal, the remedy of the executory vendor is for damages for the breach, not for the purchase price. *Lincoln v. Charles Alshuler Mfg. Co.* 475

2. The foregoing follows the rule that, ordinarily, any person has the right to breach his mere executory agreement and submit to legal damages therefor. *Ibid.*

3. The situation supposed in No. 1 is unlike where there is a sale *in præsenti*, there having either been a transition of title or something equivalent thereto before the breach; or where an article to be manufactured to order, prior to the breach, was, in whole or some substantial part, created and has no general marketable quality. It is one where the particular goods to satisfy the agreement have not, prior to the breach, been segregated from a stock of such goods, or the materials for the manufactured product are yet to be acquired by the executory vendor or are on hand as ordinary manufacturer's stock, and are available to such vendor without special loss either for sale or incorporation into manufactured articles for others. *Ibid.*

4. In such a case the general rule applies that recoverable damage is limited to such as may be reasonably said to have been in mutual contemplation at the inception of the contract as the probable result of a breach of it. *Ibid.*

5. The more particular rule applicable to the situation supposed is that the recoverable damage is the difference between the agreed price and the fair market value of the property at the time of the breach and place for delivery, subject to the exception that in case of there being no such market value at such place, such value may be determined at some other place, just to the executory vendee. *Ibid.*

6. Where a mere agreement to purchase is repudiated by the executory vendee before tender of the subject of sale or before the executory vendor has done all required of him in order to a transition of title, he cannot liquidate his damages by selling the subject, or an ostensible subject, of the agreement as the

property of the executory vendee, but a sale fairly conducted by him of the actual, or a similar, subject might create evidence on the question of damages. *Ibid.*

7. In case of an executory contract to sell and deliver goods on credit, the seller may, if in the meantime the purchaser becomes insolvent or shows evidence of incapacity to pay for the property, by defaulting on existing indebtedness, eliminate such element and treat the contract as an agreement for a cash sale. *Ibid.*

8. In the circumstances stated in the last foregoing, the executory vendor cannot eliminate any other element than that of credit; the feature as to time and place of delivery, he must comply with, at his peril of being liable for a breach. *Ibid.*

Requisites and validity: Parties, proposals, and acceptance: Ambiguity.

9. Ambiguity in a written order for goods, due to failure to state the name of the party from whom they are ordered, is removed by the filling of the order by the company whose agent received it, the sending of an invoice corresponding therewith to the purchaser, and his acceptance of the goods. *Ady v. Barnett,* 18

10. A written order for goods, specifying prices and terms of payment, coupled with acceptance thereof, constituted a written contract, and in the absence of fraud or mutual mistake its terms cannot be varied by proof of a prior or contemporaneous oral agreement by the vendor's agent that the purchaser need pay for only so much of the goods as he might sell and that the unsold portion might be returned at any time. *Ibid.*

Same: Formalities. See CORPORATIONS, 1–3.

Same: Recitals.

11. Recitals in a contract in the form of a preamble may create express obligations between the parties if they contain words of binding import. *Collat v. Gottschalk,* 503

Same: New contract. See LANDLORD AND TENANT, 4.

Same: Consideration. See FIXTURES, 2.

Same: Legality of object and consideration.

12. Contracts in violation of the common law or statutes are void and cannot be made the foundation for the enforcement of a legal right. *Pozorski v. Gold Range Comm. Corporation,* 595

13. A contract by which plaintiff was to sell the bonds of a corporation, receive the proceeds and expend them for its benefit, receive all the proceeds of the corporate business and retain for himself fifty per cent. thereof, as part compensation for his services in selling the bonds, until such fifty per cent. should equal the amount received from the sale of the bonds, and was to have a first lien on all the property of the corporation to secure payment to him of an amount equal to the proceeds of the bonds sold by him, in legal effect made plaintiff the owner of the proceeds of the bonds, with an obligation to advance the money to the corporation upon security for its repayment, and was in violation of sec. 1753, Stats. (1898), because under it the corporation would not actually receive seventy-five per cent. of the par value of the bonds in money, labor, or property. *Ibid.*

Same: Mutuality. See CONTRACTS, 29–36.

Same: Enforcement: What law governs: Comity.

14. As to mere personal contracts, their validity and interpretation is referable to the *lex loci contractus*, unless the parties intended they should be governed by the *lex loci solutionis* or that of some other place, the real place of the contract being a matter of mutual intention, except in exceptional circumstances evincing a purpose in making the contract to commit a fraud on the law. *International Harvester Co. v. McAdam*, 114

15. What the intent was, mentioned in No. 14, as to the place of the contract in any case, is generally determinable by presumption of fact that the place of the contract was intended to be that where it was actually made, unless the place of performance was elsewhere, then the presumption is that the latter was intended, but such presumptions are rebuttable. In this the term "place of the contract" means the place mutually intended for reference as to validity and interpretation. *Ibid.*

16. The law as to manner of performance is referable to the place of performance, while remedies for nonperformance are referable to the law of the forum where performance is sought to be enforced. *Ibid.*

17. A contract valid by the law of the place thereof is valid everywhere. *Ibid.*

18. The affording of remedies in one country for enforcing a contract which would not be valid if made in such country, but is valid by the law of the place where it was made, depends upon judicial comity of nations. *Ibid.*

19. The comity mentioned is uniformly extended unless such contracts as the one sought to be enforced are contrary to the public policy of the country of the forum, as declared by its courts or its lawmaking power on grounds of good morals, or the state or its citizens would be injured. *Ibid.*

20. The scope of the comity spoken of, within reasonable limitations, is determinable, as a matter of judicial policy, by each state for itself. *Ibid.*

21. The rule that the law of a place of a contract governs, as to its validity and interpretation, applies to the capacity, including that of married women, to contract. *Ibid.*

22. The rule that a contract, valid by the law of the place thereof, is valid everywhere, is without exception, notwithstanding in some cases a foreign contract is not enforceable. *Ibid.*

23. A foreign contract, of a class which if it were made in the country of the forum would be contrary to the law thereof, is not necessarily unenforceable in such forum because such a contract is contrary to public policy. To be so, the contract must be, by moral standards in the judgment of the court, pernicious and injurious to the public welfare. *Ibid.*

24. The contract of a married woman as accommodation maker of commercial paper having not been judicially declared unenforceable in this state on grounds of public policy, nor prohibited by legislation as pernicious, is enforceable in our courts, in case of its having been made in another state where such contracts are valid, unless such contracts are, in fact, inherently bad in the sense indicated in the foregoing rules. *Ibid.*

25. The general legislative policy of this state as to relieving married women from common-law disabilities to contract, and other considerations, negative the idea that full right in that regard would involve anything inherently bad and warrant our courts in refusing to enforce the foreign contract of a married woman as accommodation maker of a promissory note on grounds of public policy. *Ibid.*

Construction and operation. See APPEAL, 21. BROKERS.

26. A contract to drill a well does not imply that water shall be obtained or that the well will be a success as to either the quantity or quality of the water. *Lemke v. Hage,* 178

Same: Custom and usage.

27. In order that a particular custom or usage shall be considered as part of a contract, it must be so well established, uniform, and notorious that the parties must be presumed to have known it and to have contracted with reference to it; and the proof of such custom must be positive, clear, and satisfactory. *Lemke v. Hage,* 178

28. A particular custom or usage to the effect that one who undertakes to drill a well is not entitled to compensation unless a reasonably sufficient supply of water is obtained, was not established by the testimony of two witnesses that they followed such practice in their own business. *Ibid.*

Reformation. See CONTRACTS, 34.

29. Where the minds of the parties met upon the terms of a contract executed by them, or where, in the absence of fraud, a mistake was that of one party only, the contract will not be reformed. *Grant Marble Co. v. Abbot,* 279

30. One asking reformation of a contract must show that the minds of the parties met upon the contract which he seeks to establish. *Ibid.*

31. If by the fraud of one party the real contract is not expressed in the writing, and the other party by mistake receives such writing as the real contract, reformation may be had. *Ibid.*

32. The fact that the price for which plaintiff, through its president, contracted to do certain marble work in six stories of defendant's building was, by mistake of such president, based upon estimates which had been made by plaintiff's architect for work in five stories only, did not entitle plaintiff to reformation of the contract, where both parties understood and agreed to the terms of the contract as made, and intended no other, and the mistake was not induced by defendant nor known to him at the time. *Ibid.*

Rescission.

33. A court of equity will not rescind a contract upon which the minds of the parties met, merely because one of them, without the knowledge of the other, was laboring under a mistake. *Grant Marble Co. v. Abbot,* 279

34. Where plaintiff seeks to reform or rescind a contract because of his own mistake, of which he claims defendant had knowledge, the burden is upon him to establish such knowledge by clear and satisfactory evidence. *Ibid.*

35. One who seeks to rescind must act promptly upon discovery of the facts which he claims entitle him to rescission, and must

take no steps in affirmance of the contract. Thus, a contract will not be rescinded for mistake where the party asking such relief completed the contract and afterwards brought an action to reform it. *Ibid.*

36. One cannot rescind a contract for mistake due to his own want of ordinary care. *Ibid.*

Performance or breach: Right to recover. See CONTRACTS, 1–8, 14–25, 41. DAMAGES, 1, 2. INTEREST. PLEADING, 1–6.

37. Where one party to a contract, though ready and willing to carry it out, is prevented from so doing by default of the other party, the latter cannot take advantage of such failure of performance. *Case v. Beyer,* 496

38. Where by agreement a note is to be returned to the makers unless a third person performs a certain contract, and the makers by their own default prevent such performance, the holder of the note may recover thereon even though he purchased it with knowledge of such agreement. *Ibid.*

39. Covenants prior with reference to time of performance, going to the consideration of the contract, and of such nature that breach thereof cannot be adequately compensated in damages, will (nothing else appearing to the contrary) be so construed as to require performance thereof before the duty of performance arises on the part of the other party to the contract. *Collat v. Gottschalk,* 503

40. A covenant that shares of stock shall be placed in trust with a third person who shall have power to vote the same, in consideration of which the other party to the contract agrees to sell other shares of the same corporation to the public for the account of the party so required to put his shares in trust, is such a covenant as is described in paragraph 39. *Ibid.*

Actions for breach: Quantum meruit.

41. Where the owner of a building, upon being informed by a contractor for work therein that, through a mistake in basing his figures upon estimates for five instead of for six stories, the price for the work had been fixed too low, replied that he did not wish the contractor to suffer a loss on the contract, directed him to complete the work, and said that a fair settlement would be made, the contractor could not recover upon a *quantum meruit,* but could recover the amount of any loss actually sustained by him on the contract, *i. e.* any sum in excess of the contract price necessarily expended in doing the work. *Grant Marble Co. v. Abbot,* 279

CONTRIBUTORY NEGLIGENCE. See AUTOMOBILES, 5, 6. CONTRACTS, 36. MASTER AND SERVANT, 7, 9. NEGLIGENCE, 3. RAILROADS, 7. RELEASE, 6.

CORPORATIONS.

Capital stock: Subscriptions: Release. See EQUITY, 4–6.

1. Tender of a stock certificate is not a condition precedent to liability upon a stock subscription, in the absence of any stipulation to that effect in the agreement. *Milwaukee S. & R. Co. v. Lindenberger,* 273

2. Where a subscriber to stock who has paid only a portion of his subscription tenders his resignation as an officer and director

and states his decision not to take any more stock than he has already paid for, action of the board of directors in accepting his resignation and instructing the secretary to send him formal assignments for the transfer of his subscription (which the subscriber never executes or returns) is insufficient to effect the cancellation of his subscription or to release him from liability thereon. *Ibid.*

3. Proof of the sale of the property of a corporation and a suspension of business activity for the time being does not show such an abandonment of the business enterprise for which the corporation was organized as will relieve from liability a subscriber for stock, where it does not appear but that the company may resume its business upon payment of the unpaid stock subscription. *Ibid.*

Same: Sale on credit.

4. Sec. 1753, Stats. (1898), does not preclude the sale of stock in part at least upon credit; and the word "void" as used therein does not mean incapable of validation, but stock issued in violation of that section may afterwards be validated by payment of full consideration therefor. *Whitewater T. & P. B. Mfg. Co. v. Baker,* 420

Same: Pledge as collateral. See CORPORATIONS, 8.

Same: Fraudulent issue of stock.

5. From allegations in a complaint, stated in the opinion, it is assumed, on demurrer, that certain shares were legally issued except for the fact that they were not paid for. *Whitewater T. & P. B. Mfg. Co. v. Baker,* 420

6. Where a subscriber for stock in a corporation fraudulently procures the issuance to himself of certificates for a larger number of shares than he has subscribed and paid for, the corporation may elect to ratify the transaction, treat the additional shares as validly issued, and sue to recover the par value thereof from him. *Ibid.*

[7. Whether, when such subscriber is an officer of the corporation, he can be compelled to account for profits made by him on a sale of the fraudulently issued stock, over and above the par value, not determined.] *Ibid.*

Bonds. See CONTRACTS, 13.

Officers: Directors. See CORPORATIONS, 10. WITNESSES, 2.

Suing in behalf of corporation to recover wasted assets.

8. One taking corporate stock as security for a loan to a person who practically controls the corporation is entitled to have his security protected from fraudulent dissipation before the debt matures, even though it does not appear that the debt will not otherwise be paid at maturity. *Cream City Mirror Plate Co. v. Coggeshall,* 651

9. General creditors of the corporation have the same right if their interests are being jeopardized. *Ibid.*

10. If in such a case the assets of the corporation have been wasted because of a fraudulent breach of trust on the part of its directors, such directors are personally responsible for the loss. *Ibid.*

11. Where, after such waste has occurred, the control of the corporation passes into friendly hands, the action to compel restoration of the assets by those responsible for the waste may properly be brought in the name of the corporation, rather than in the name of a creditor or of a person holding its stock as security. *Ibid.*

Foreign corporations: Regulation of commerce.

12. A shipment of goods from another state to a purchaser in this state by a foreign corporation pursuant to an order therefor taken by its agent in this state, constitutes interstate commerce, the soliciting of the order being part of the entire transaction, and sec. 1770*b*, Stats. (1898), is not applicable. *Ady v. Barnett,* 18

Same: Service of process. See PROCESS, 1, 3.

COSTS.

Nature, grounds, and extent of right.

1. In replevin for hay, an allegation in the complaint that the hay was cut from certain land, and a finding by the court that one A. was the owner of the land from which it was cut, do not show that the title to real property came in question so as to entitle plaintiff to costs on that ground upon a recovery of less than $50, where the pleadings did not put in issue the title to the land and the trial court found that it did not come in question. *Wolfe v. Furman,* 94
2. Although the proponent of a will in which he is named as executor is ordinarily entitled to recover his costs out of the estate whether successful or not, because it is his duty to present the will for probate, yet where he is adjudged to have procured the execution of the will by fraud and undue influence he should not recover costs but should be required to pay costs. *Deleglise v. Morrissey,* 234
3. The right to costs does not accrue until judgment, and until that time they may be abolished or changed in amount by statute. *Huebl v. Scollard,* 589
4. Unless made liable by special direction of the court under sec. 2932, Stats. (Laws of 1907, ch. 325), a guardian *ad litem* is not responsible for costs adjudged against his ward after the repeal of sec. 2931, Stats. (1898), by said act of 1907, even though the action was commenced prior to such repeal. *Ibid.*

Taxation. See APPEAL, 22.

COUNTERCLAIM. See MECHANICS' LIENS, 4. PARTITION, 1. PLEADING, 9. SALES, 1.

COURTS. See EMINENT DOMAIN, 1–8. JUDGMENT, 5, 6.

COVENANTS. See CONTRACTS, 39, 40. DEEDS, 2. FRAUD, 1, 2. PLEADING, 11.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime. See ASSAULT AND BATTERY. HOMICIDE. RAPE.

1. The word "wilful" in the criminal law involves evil intent or legal malice. *State v. McAloon,* 72

[2. Whether sec. 4550, Stats. (1898), makes the wilful issuance of an unauthorized town order a misdemeanor, not determined.] *Ibid.*

Trial: Separate trials. See ASSAULT AND BATTERY, 2.

Appeal and error: Assignment of errors.

3. The accused cannot, as a matter of strict legal right, predicate error upon the refusal of the trial court to instruct the jury as orally requested; but the supreme court may, in its discretion, consider the point as raised. *Bradley v. State,* 137

Same: Review.

4. The verdict in a criminal case will not be disturbed on appeal if there is any credible evidence which in any reasonable view supports it. *Van Haltren v. State,* 143

CROSS-EXAMINATION. See WITNESSES, 3.

CUSTOM AND USAGE. See CONTRACTS, 27, 28. NAVIGABLE WATERS, 4.

DAMAGE FEASANT. See ANIMALS.

DAMAGES.

Nominal damages.

1. Where, after breach by the vendor of a contract to furnish ice to a retailer, the latter made no reasonable effort to procure ice elsewhere, although he might have obtained plenty of it at, or for less than, the contract price, and no actual damage from the breach is shown, only nominal damages are recoverable. *Anderson v. Savoy,* 127

Nature and grounds. See CONTRACTS, 1–8.

Measure of damages: Breach of contract. See CONTRACTS, 4–6, 41.

2. A finding that plaintiff is entitled to a certain sum as its reasonable charge, agreed to and approved by an authorized employee of defendants, for sketches prepared by plaintiff to be used by defendants and to remain the property of plaintiff, is sustained by the evidence. *Associated Artists v. Clement,* 490

Excessive damages.

3. An award of $3,150 for injuries consisting in the breaking of both bones of the leg above the ankle and resulting in a permanent deformity and impairment of the use of the foot, is *held* not excessive. *Forseth v. Iron River Lumber Co.* 87

4. An award of $250 for injuries to person and property caused by an automobile being negligently run into a wagon on the highway, is *held* not excessive. *Anderson v. Sparks,* 398

DEATH. See HOMICIDE. INSTRUCTIONS TO JURY, 14, 15. MASTER AND SERVANT, 7. STREET RAILWAYS, 2.

DEBTOR AND CREDITOR. See CORPORATIONS, 8–11. DAMAGES, 11, 12. DIVORCE, 4, 5. LOGS AND TIMBER. MECHANICS' LIENS. STIPULATIONS. VENDOR AND PURCHASER.

DECEIT. See FRAUD, 1, 2.

DECLARATIONS. See TAX TITLES, 8.

DEEDS.

Recording and registration. See DEEDS, 2. PLEADING, 11.

1. A deed bearing upon its face such a certificate of acknowledgment as the statute requires is entitled to record, notwithstanding the date of the certificate is earlier than the date of the deed. *Blaha v. Borgman,* 43

Construction. See DEEDS, 4–6. EASEMENTS. MORTGAGES, 4–7. PUBLIC LANDS, 4.

Same: Covenants as to title: Duty of grantee to record.

2. As against the grantor, the grantee in a warranty deed has a right to rely upon the covenants therein and is not charged with any duty to record the deed for the purpose of cutting off the title of prior grantees who are not in possession and whose deeds have not been recorded. *Darlington v. J. L. Gates L. Co.* 198

Same: Construction: Reservation for benefit of grantor.

3. A deed conveying all of a certain tract of land except a strip on each side thereof and providing that a railway company should have a right of way of designated width across the whole tract, but not specifying the ownership of the excepted strips nor stating that the right-of-way clause was inserted for the benefit of those strips or either of them, was sufficiently ambiguous to warrant admission of extraneous evidence as to the circumstances surrounding the parties when it was executed. *Barkhausen v. Chicago, M. & St. P. R. Co.* 292

4. It being shown that the grantor was the owner of one of the excepted strips when the deed was made, that it was valuable chiefly for factory sites, and that it could not well be reached by a spur track unless over the land conveyed, it sufficiently appears that the provision for right of way was inserted for the benefit of the grantor as owner of such adjacent strip. *Ibid.*

5. A deed will be so construed as to effectuate the intention of the parties if the language used is reasonably susceptible of such construction. *Ibid.*

6. A clause in a deed, inserted for the grantor's benefit, providing that "it is also understood" that a certain railway company shall have a right of way across the land conveyed, was a covenant, the word "understood" being equivalent to "agreed;" and upon acceptance of the deed such agreement became binding upon the grantee. *Ibid.*

[7. Whether, in a grant of land, a reservation for the benefit of a third person is void, as stated in *Strasson v. Montgomery,* 32 Wis. 52, not determined.] *Ibid.*

DEFAULT. See JUDGMENT, 1–4.

DELEGATION OF LEGISLATIVE POWER. See CONSTITUTIONAL LAW, 3–6.

DELIVERY. See CONTRACTS, 1, 3, 8.

DEMAND. See ANIMALS.

DEMONSTRATIVE EVIDENCE. See EVIDENCE, 4.

DEMURRER. See CORPORATIONS, 5. PLEADING, 8, 9.

DEPOSITS. See STIPULATIONS.

DEVISES. See WILLS, 7–9.

DIRECTORS. See CORPORATIONS, 10.

DISABILITY. See ADVERSE POSSESSION.

DISCRETION. See ASSAULT AND BATTERY, 2. CRIMINAL LAW, 3. EMINENT DOMAIN, 8. JUDGMENT, 1, 2. NEW TRIAL, 1. TRIAL, 3. WITNESSES, 1, 3.

DISMISSAL AND NONSUIT. See APPEAL, 6, 19, 21. RAILROADS, 6.

DISSEISIN. See ADVERSE POSSESSION, 1, 5, 9.

DISTRESS. See ANIMALS.

DIVORCE.

Alimony, allowances, and division of property

1. Authority to allow permanent alimony to a party in a divorce action or a portion of the property of the parties to one of them as a permanent settlement of their property rights, is referable, wholly, to the written law. *Brenger v. Brenger,* 26
2. Permanent alimony is allowable out of the property and earnings of a divorced husband to his divorced wife, but not to the former out of the earnings and property of the latter. *Ibid.*
3. The property of the husband and that of the wife derived from him, may be considered together in making a permanent adjustment of property rights upon a judicial termination of their marital relations. *Ibid.*
4. Upon such termination no part of the separate property of the wife, not derived from the husband, can properly be divested and transferred to the husband or burdened by his debts. *Ibid.*
5. In adjusting property rights of the parties in a divorce action, in case an estate shall have been during coverture conveyed to the wife by the husband to compensate her for care of him, and she shall have, without reasonable excuse, defaulted in that regard, the transfer should, by rules for judicial construction, be held to have been made upon condition subsequent, and, because of the default, should be restored to him and the condition thus created be then dealt with in settling matters respecting alimony to her or division of property between the parties. *Ibid.*
6. Every provision for support in a judgment in a divorce action, whether it requires payment of money at intervals or in a gross sum, is to be regarded as alimony whether so expressly stated or not. *Ibid.*
7. Judicial authority to make a division of property between the parties to an action for a divorce is referable solely to sec. 2364, Stats. (1898). *Ibid.*
8. Under such section no power is given to take any part of the separate property of the wife not derived from the husband and transfer the same to the latter, while authority in that regard is expressly negatived by sec. 2372, Stats. (1898). *Ibid.*

Same: On appeal.

9. A motion for suit money and temporary alimony pending an appeal in a divorce action is denied because, no bill of exceptions having yet been returned, the court is unable to say whether there are merits in the appeal. *Hermann v. Hermann,* 529
10. Same point. *Hartung v. Hartung,* 530

Same: Rights of creditors of parties. See DIVORCE, 4, 5.

11. An allowance for support, adjudged in a divorce action, does not constitute indebtedness to the party in whose favor the allowance is made which can be reached by creditors of the latter. *Brenger v. Brenger,* 26

12. Payments in money required by the judgment in a divorce action to be made by one party to the other as the portion of that other upon a division of the property of the parties may be reached by the creditors of that other. *Ibid.*

13. In settling the property rights of parties upon a judicial dissolution of their marriage contract it is proper, if not the duty of the court, to so provide as to preserve to them, subject to their individual rights after the separation of contracting to the contrary, their statutory exemptions from claims of creditors, while at the same time the indebtedness of each, in determining the property status to be dealt with in settling property rights, should be considered. *Ibid.*

DOCKETING OF JUDGMENT. See JUDGMENT, 7, 8.

DOCUMENTS. See EVIDENCE, 3.

DOWER. See HUSBAND AND WIFE, 3, 7.

DRAINS. See NAVIGABLE WATERS, 1, 2.

DRAWBRIDGES. See NAVIGABLE WATERS, 3, 4.

DUE PROCESS OF LAW. See PROCESS, 1.

EASEMENTS.

See EMINENT DOMAIN, 14, 15.

An easement, created or reserved in a grant, for the benefit of adjoining land of the grantor is appurtenant to such land and binding on that granted, and passes by a subsequent conveyance of the dominant estate without express mention in the conveyance. *Barkhausen v. Chicago, M. & St. P. R. Co.* 292

ELECTION OF REMEDIES. See APPEAL, 21. EQUITY, 2–6. HUSBAND AND WIFE, 7.

ELECTIONS.

Regulation. See CONSTITUTIONAL LAW, 2, 7.

Ballots.

1. The legislature has power to prescribe reasonable regulations governing the manner in which names may be placed on the official ballot, printed and distributed at public expense. *State ex rel. Van Alstine v. Frear,* 320

Same: Marking ballots.

2. A ballot marked in such a manner that the intent of the voter can be gleaned therefrom should be received and counted so as to effectuate that intent. *State ex rel. Crain v. Acker,* 394

3. In *quo warranto* proceedings the question as to the intent of voters in marking their ballots in a certain irregular way is for the jury if, from the ballots themselves in connection with the extrinsic facts in regard to the situation, any reasonable mind might, by legitimate inference, ascertain such intent. *Ibid.*

4. Subd. 3, sec. 57, Stats. (Laws of 1907, ch. 583), is of no assistance in determining the intent of a voter in placing a mark upon the ballot in the same space with the printed names of two candidates, but opposite a blank line left for individual nominations. *Ibid.*

5. From a mark so placed no intent to vote for either of the two candidates whose names are printed can be inferred, especially where knowledge of the proper method of voting is shown by other portions of the ballot. *Ibid.*

Elections as to improvements. See MUNICIPAL CORPORATIONS, 13–15.

Primary elections. See CONSTITUTIONAL LAW, 7, 8.

6. The fact that a person nominated for an office by nomination papers, as provided in secs. 30–32, Stats. (1898), may have as many signatures to his petition as he can get, while a candidate for nomination on a party ticket to be voted for at a primary election, under ch. 451, Laws of 1903, is restricted as to the number of signatures he may procure, does not show such a discrimination against the candidate at the primary as renders the act of 1903 invalid, the conditions and the circumstances applicable thereto being different in the two cases. *State ex rel. Van Alstine v. Frear,* 320

7. The fact that under ch. 451, Laws of 1903, the members of one political party may vote at the primaries for candidates of a different party, does not render the law invalid. *Ibid.*

8. The requirement in ch. 451, Laws of 1903, that each candidate to be voted for at the primary shall file a declaration that he will qualify for the office if nominated and elected, does not render the act invalid as prescribing a qualification for office additional to those required by the constitution. *Ibid.*

Same: United States senator.

9. The provisions in ch. 451, Laws of 1903, for the nomination at primary elections of party candidates for the office of United States senator do not impose any legal obligation upon any member of the legislature to vote for his party nominee or restrict the choice to persons who were voted for at the primary, and do not forbid the members of the legislature from making nominations or prevent the holding of caucuses for that purpose, but merely afford an opportunity for the people to express their preference and for the legislators to become advised as to public sentiment, and hence do not contravene the federal constitution or the federal statutes respecting the election of United States senators. *State ex rel. Van Alstine v. Frear,* 320

10. The action of the electors in nominating, at the primary, candidates for the office of United States senator, amounts to nothing more than an exercise of the right of petition. *Ibid.*

EMINENT DOMAIN.

Nature of proceedings.

1. A proceeding under secs. 1845–1851, Stats. (1898), to acquire property by the right of eminent domain, is a suit in court, a judicial proceeding from the commencement to the end, except as to an appeal from the award; to that extent, it is in the nature of an ordinary action in court. *Milwaukee L., H. & T. Co. v. Ela Co.* 424

2. A proceeding as aforesaid being a suit, commenced by filing the petition, the court has all inherent power in respect thereto which it has, in general, respecting actions or suits in the nature of actions, including power to vacate the award of commissioners therein for improper conduct, or such conduct of parties. *Ibid.*

3. A proceeding as in No. 1 being a suit in court, and not denominable as an action, or being such because commencible by the service of a summons, its statutory name is "a special proceeding," since all civil remedies under the Code are divided into ordinary actions or such proceedings. *Ibid.*

4. Though the Code abolished the common-law distinctions between suits and actions and did away, entirely, with the name "suits" as the name of a class of judicial remedies, the essential character of such remedies has not been changed. A suit now is either an action or a proceeding in the nature of an action in court. *Ibid.*

5. In vacating the award of commissioners in condemnation proceedings for improper conduct on their part, the court acts by virtue of its inherent power which stands by the side of and goes with, or without, the statute, where necessary in the due administration of justice. *Ibid.*

6. The appeal allowable in condemnation proceedings is solely to review the honest judgment of the commissioners respecting compensation for property taken. It does not undo, directly, the wrong committed by improper conduct of commissioners such as would vitiate a verdict in a civil action. *Ibid.*

7. The landowner is entitled to the fair judgment of the commissioners in condemnation proceedings, and to appeal therefrom if dissatisfied. *Ibid.*

8. A motion to set aside the award of commissioners for improper conduct is addressed to the sound discretion of the court, and the result will not be disturbed on appeal unless it clearly appears to have been the result of abuse of discretion or mistake of law. *Ibid.*

Proceedings to take property: Petition.

9. Where the petition in proceedings to condemn land for an electric railway states that "reference is hereby made" to a certain franchise granted by a city "to the same effect as though a certified copy were hereto annexed and made part hereof," and the record contains a certified copy of a franchise which both parties treated as the one referred to, the supreme court may, on appeal, ignore the informality in the pleading and consider the case as if the franchise were made a part of the petition. *Milwaukee L., H. & T. Co. v. Burlington E. L. & P. Co.* 436

10. In proceedings to condemn land for an electric railway, failure of the petition to show the ability of the company to reach that particular point in its road does not render the petition insufficient. *Ibid.*

Same: Franchise.

11. Where a franchise granting the use of a street to an electric railway company required only that the track approximate the center of the street as near as practicable, with exception in favor of switches, turnouts, or side tracks which might be controlled by certain city officials, a construction of the road might be ap-

proved which would render reasonably necessary the taking of land abutting on the street; and on appeal from an order of the circuit court declaring the necessity of such taking, it will be presumed, in the absence of any bill of exceptions, that approval of such a construction was shown to the satisfaction of the court. *Milwaukee L., H. & T. Co. v. Burlington E. L. & P. Co.* 436

12. A franchise granting the use of a city street is a condition precedent to the right of an electric railway company to condemn the rights of abutting owners in such street, and to the jurisdiction of the court to grant such condemnation. *Ibid.*

13. A franchise granting merely the right to cross a street within the limits of another street cannot be deemed a permission to occupy any part of the first-mentioned street not within the crossing. *Ibid.*

Remedies of owner of property. See INJUNCTION, 3–6.

14. The grantee of land subject to a railroad right of way for the benefit of an adjoining parcel cannot maintain condemnation proceedings because of the building and use of a spur track to serve such parcel, without showing that such track has been or is being used in some way not necessary or convenient for that service, so as to impose an additional servitude upon his land. *Barkhausen v. Chicago, M. & St. P. R. Co.* 292

15. It is not essential in such case, in order to defeat the application for condemnation, that the railway company, relying upon the easement, should show that the spur track was actually built at the request of the owner of the parcel served thereby, where it appears that the track is essential to the beneficial use of such parcel. *Ibid.*

Same: Parties.

16. The owner of a parcel of land to which a right of way for a railroad is appurtenant was properly made a party in condemnation proceedings instituted by the owner of the servient estate upon the ground that the construction and use of a spur track over his land was unauthorized. *Barkhausen v. Chicago, M. & St. P. R. Co.* 292

Same: Right of appeal.

17. The fact that in proceedings to condemn land for a railway the owner joined in the litigation before the commissioners under an order declaring the necessity of the taking and appointing such commissioners, and has appealed from their award, does not prevent his maintaining an appeal from a portion of such order which was in excess of the court's jurisdiction over the subject matter. *Milwaukee L., H. & T. Co. v. Burlington E. L. & P. Co.* 436

ENTRY. See ADVERSE POSSESSION, 1, 6, 7.

EQUITY.

Jurisdiction. See CONTRACTS, 29–36. INJUNCTION. LOGS AND TIMBER, 3. NAVIGABLE WATERS, 2.

1. Where a court of equity has jurisdiction over some substantial portion or incident of a controversy such jurisdiction will extend to and embrace the whole subject matter of such controversy. *St. Croix Timber Co. v. Joseph,* 55

Same: Adequate remedy at law. See PLEADING, 4.

Same: Marshaling assets and securities. See LOGS AND TIMBER, 3.

Election between inconsistent positions.

2. One who, having a choice between two inconsistent positions, exercises that choice, is finally concluded and confined to the rights and remedies appropriate to the position so chosen, and excluded from those consistent only with the repudiated one. *McDonald v. Markesan Canning Co.* 251

3. The rule above stated does not necessarily rest upon grounds of estoppel, and the election may have conclusive effect as a waiver of rights, independent of any prejudice to other persons which may result from a subsequent change of front. *Ibid.*

4. Where a subscriber for stock of a proposed corporation had repudiated his contract and the other subscribers, acquiescing in such repudiation, had proceeded to form the corporation and after years of struggle had placed it upon a paying basis so that its stock was at a premium, the subscriber first mentioned had no right in equity to make payment and enforce issuance of the stock for which he had subscribed. *Ibid.*

5. Although in such case it need not be shown that the granting of such right would result in prejudice to the other stockholders, such prejudice might well be found from the facts stated. *Ibid.*

6. Where a right existing only in equity is not asserted, and no intimation of any purpose to assert it is given, until years after it arose, during which time there has been such a change in the situation that enforcement of the right will work substantial hardship, inconvenience, or embarrassment to the other party which would not have followed its prompt assertion, the claim founded on such right will be deemed stale and inequitable, whether sought to be enforced by the party originally entitled or by an assignee. *Ibid.*

Laches. See CONTRACTS, 35. EQUITY, 6. HUSBAND AND WIFE, 7. INJUNCTION, 5.

7. Mere delay for a period of time less than that fixed by the statute of limitations governing the particular case, where the opposing party has not been prejudiced by that delay, is not laches. *Schuster v. Milwaukee E. R. & L. Co.* 578

EQUITY OF REDEMPTION. See MORTGAGES, 1–7.

ESCROW. See HUSBAND AND WIFE, 6.

ESTOPPEL. See EQUITY, 3. HUSBAND AND WIFE, 7. INFANTS. INJUNCTION, 3. PLEADING, 8. PUBLIC LANDS, 7.

EVIDENCE.

Presumptions. See ADVERSE POSSESSION, 8. APPEAL, 5–7. CONTRACTS, 27. ELECTIONS, 5. EMINENT DOMAIN, 11. LOGS AND TIMBER, 2.

Burden of proof. See APPEAL, 14. CONTRACTS, 34. INSTRUCTIONS TO JURY, 6, 7, 13. LIBEL AND SLANDER, 1, 3. MASTER AND SERVANT, 5. MORTGAGES, 2, 3. PAYMENT, 1.

Relevancy and competency. See EVIDENCE, 5. HOMICIDE, 2. MASTER AND SERVANT, 10. MORTGAGES, 4, 8. NAVIGABLE WATERS, 4. PAYMENT, 2. PROCESS, 4.

1. In an action for injuries alleged to have been caused by a hole in a highway, evidence as to the existence of other holes in the immediate vicinity of the one in question was competent upon the question of notice to the town. *Kortendick v. Waterford,* 413

Best and secondary evidence. See CONTRACTS, 10. DEEDS, 3, 4. LANDLORD AND TENANT, 3.

[2. Whether it is permissible to establish by parol the contents of letters sent to a person in another state, with no proof whatever of efforts or inability to obtain the originals, not determined.] *Blaha v. Borgman,* 43

3. The conclusion of the trial court that the destruction of papers was blameless and consistent with ordinary care under the circumstances, and therefore rendered secondary evidence of their contents admissible, has on appeal the impregnability of a finding of fact. *Ibid.*

Demonstrative evidence: Photographs.

4. Photographs which were shown to give a correct view and representation of the place where plaintiff was working at the time of the accident were properly admitted in evidence. *Forseth v. Iron River Lumber Co.* 87

Admissions. See ASSAULT AND BATTERY, 3. TRIAL, 4.

Declarations. See TAX TITLES, 8.

Opinion evidence. See APPEAL, 12.

5. Testimony of a veterinary surgeon, qualified as an expert, that pneumonia might result from an injury sustained by a horse in falling upon a highway, was competent. *Kortendick v. Waterford,* 413

6. Expert testimony alone may be sufficient to sustain a finding by the jury that pneumonia which caused the death of a horse resulted from a severe fall on the highway. *Ibid.*

Weight and sufficiency. See ADVERSE POSSESSION, 1. BROKERS. CARRIERS, 2. CONTRACTS, 27, 28. DAMAGES, 2. EVIDENCE, 6. HIGHWAYS. HOMICIDE, 2. MASTER AND SERVANT, 2, 6, 8, 16, 17. MUNICIPAL CORPORATIONS, 12. PAYMENT, 3. RAILROADS, 6, 7. RAPE, 2. RELEASE, 10, 11. WILLS, 1.

EXCEPTIONS. See APPEAL, 1. FRAUD, 7.

EXCEPTIONS, BILL OF. See APPEAL, 5.

EXCESSIVE DAMAGES. See DAMAGES, 3, 4.

EXECUTIONS. See JUDGMENT, 7, 8.

EXECUTORY CONTRACTS. See CONTRACTS, 1–8. HUSBAND AND WIFE, 4.

EXEMPTIONS. See DIVORCE, 13. PUBLIC LANDS, 3–7.

EXPERT TESTIMONY. See APPEAL, 12. EVIDENCE, 5, 6.

FALSE REPRESENTATIONS. See FRAUD, 1, 2.

FEES. See CLERKS OF COURTS.

FELLOW-SERVANTS. See MASTER AND SERVANT, 12, 15–17, 22.

FINDINGS. See APPEAL, 1, 3, 4, 7, 9–11, 16. BILLS AND NOTES. BROKERS. CARRIERS. COSTS, 1. EVIDENCE, 3. HIGHWAYS. MASTER AND SERVANT, 16, 17. RAILROADS, 7. SALES, 1.

FIXTURES.

1. If a lessee surrenders possession of the premises before removal of a fixture, without an express reservation of the right of removal, he loses all right to remove it. *Phelps v. Ayers,* 442

2. The law implies in such a case that the lease and the use and occupation of the premises thereunder constitute a consideration compensating the lessee for the cost of adding the fixture to the land, and can afford no relief if the lessee sustains pecuniary loss by his omission to remove it. *Ibid.*

3. An icehouse, built on leased premises by the lessee in such a way as to make it a substantial and completed structure adapted to the use of the realty, became a fixture and the lumber used therein ceased to be personalty, notwithstanding circumstances from which it might be inferred that the enterprise was of a temporary nature and was to continue only for the one season covered by the lease. *Ibid.*

FORECLOSURE. See MECHANICS' LIENS, 3, 4. MORTGAGES, 6–8.

FOREIGN CORPORATIONS. See APPEAL, 2. CORPORATIONS, 12. PROCESS, 1, 3.

FORFEITURES.

A civil action will lie to recover the forfeiture imposed by sec. 823, Stats. (1898), upon an officer issuing a town order without authority of the town board, at least if his act was not wilful. *State v. McAloon,* 72

FRANCHISES. See EMINENT DOMAIN, 9–13.

FRAUD.

Deception constituting fraud and liability therefor. See CONTRACTS, 31. INFANTS. MUNICIPAL CORPORATIONS, 7.

False representations: Action for deceit.

1. Fraudulent representations as to title, knowingly made by the vendor and relied upon by the vendee to his damage, do not become merged in the covenants of a warranty deed subsequently given; and a tort action for the deceit may be maintained. *Darlington v. J. L. Gates L. Co.* 198

[2. How or to what extent the right of the grantee in a warranty deed to recover for fraudulent representations of the grantor that he owned the land and the timber thereon would be affected by the fact that such grantee recorded his deed before prior grantees of the timber recorded theirs or went into possession, where such grantees of the timber afterwards cut and removed the same, is not determined.] *Ibid.*

Actions: Evidence. See RELEASE.

3. A distinct oral agreement which ordinarily could not be shown to vary or contradict a written contract between the parties may be so shown as a matter of defense to a dishonest or fraudulent claim under the writing. *Lepley v. Andersen,* 668

4. The foregoing rule should not be applied except in a clear case, and the party alleging the fraud must establish it with that degree of certainty which is produced by clear and satisfactory evidence. *Ibid.*

5. The expressions "clear and satisfactory evidence" and "clear, satisfactory, and convincing evidence," used in defining the degree of proof required to establish fraud, are not to be considered as different in meaning. *Ibid.*

6. Where, upon the question whether defendant's use of a written contract was dishonest and fraudulent, the testimony of the two interested parties was in direct conflict, both being apparently equally credible and neither corroborated, except that the writing itself accorded with defendant's claim, and the jury were not properly instructed that the burden was upon plaintiff to establish the fraud by clear and satisfactory evidence, a verdict in plaintiff's favor was not warranted by the evidence. *Ibid.*

7. The judgment is reversed in such case because of the probability of injustice to the defendant if the verdict were permitted to stand, although he did not except to the instructions given on the subject of fraud or request the giving of other instructions properly stating the degree of certainty with which plaintiff was bound to establish that fact. *Ibid.*

FRAUDS, STATUTE OF. See HUSBAND AND WIFE, 1–7.

FRAUDULENT REPRESENTATIONS. See FRAUD, 1, 2.

GOOD FAITH. See ADVERSE POSSESSION, 4, 5. BILLS AND NOTES. LIBEL AND SLANDER, 1, 2. TRIAL, 3.

GRATUITY. See RELEASE, 1, 8.

GUARDIAN AD LITEM. See COSTS, 4. JUDGMENT, 1, 8.

HEALTH. See CONSTITUTIONAL LAW, 11, 12.

HIGHWAYS.

Regulation and use for travel: Injuries from defects. See AUTOMOBILES, 4–6. DAMAGES, 4. EVIDENCE, 1. INSTRUCTIONS TO JURY, 4, 10. MUNICIPAL CORPORATIONS, 12. NEGLIGENCE, 4. TRIAL, 6.

Same: Notice. See EVIDENCE, 1.

A finding by the jury that the defendant town had actual knowledge of a defect in a highway before the accident in question is *held* to be sustained by the evidence. *Kortendick v. Waterford,* 413

HOMICIDE.

Self-defense. See INSTRUCTIONS TO JURY, 14, 15.

1. Sec. 4354, Stats. (1898), does not apply to a case where the accused justifies the homicide as one committed in self-defense. *Bradley v. State,* 137

2. Evidence that a short time before the killing, while a group of fellow workmen, including the accused and the deceased, were returning to their boarding house, the accused was the aggressor in a quarrel with another member of the party and knocked him down with one hand while holding a revolver in the other, was competent to show the quarrelsome and homicidal disposition of the accused, nearly up to the time of the homicide, toward his workmates. *Ibid.*

HUSBAND AND WIFE.

Marriage settlements: Enforcement.

1. A written contract between husband and wife, reciting that the parties before their marriage, "having agreed to marry and intending to do so," made an agreement under which, "on account of such intended marriage and on account of the promises hereinbefore mentioned and hereinafter stated," certain real estate was to be settled upon the wife, and stating that other provisions of such agreement were made "on account of such intended marriage" and "by reason of such marriage of the parties," sufficiently shows that the oral agreement referred to was made upon consideration of marriage and hence was void under subd. 3, sec. 2307, Stats. (1898). *Rowell v. Barber*, 304
2. An oral antenuptial agreement, absolutely void under subd. 3, sec. 2307, Stats. (1898), cannot be validated by being reduced to writing and executed by the parties after marriage. Such a writing, though reciting the prior oral agreement, is merely a postnuptial contract. *Ibid.*
3. Independent of the statute of frauds (subd. 3, sec. 2307, Stats. 1898) a jointure or pecuniary provision which shall operate to bar dower and all interest of a wife in the estate of her husband must, under secs. 2167–2170, 2172, Stats. (1898), be made, and be assented to by the wife in writing, before marriage. If not so made and assented to, the wife, after the husband's death, may elect to take the share of his estate provided for in sec. 2172. *Ibid.*
4. An oral antenuptial agreement as to rights of the wife in the husband's property is not changed from an executory to an executed contract or taken out of the statute of frauds by the marriage. *Ibid.*
5. The furnishing of support and maintenance by the husband to the wife cannot be considered as part performance of or consideration for such an agreement. *Ibid.*
6. The execution by the husband of a conveyance of land to the wife in accordance with the terms of an oral antenuptial agreement which, after marriage, had been reduced to writing, and the deposit of such conveyance in escrow to be delivered to the wife after the husband's death, was not such performance of the agreement as took it out of the statute of frauds. *Ibid.*
7. The mere fact that after the death of the husband the wife assented to the recording of the conveyance above mentioned, took possession of the land, and collected some rents, did not preclude her, on the ground either of laches or estoppel, from afterwards, within the year limited therefor, electing to take the provision made for her by law, where she tendered back the title and possession of the land and the rents collected, and the estate had in no way changed its position because of her acts. *Ibid.*

Transactions between husband and wife. See PARTITION.

IDENTITY. See PLEADING, 8.

ILLEGAL CONTRACTS. See CONTRACTS, 12, 13.

IMPEACHMENT. See RELEASE, 11, 12.

IMPLIED WARRANTY. See SALES, 2, 3.

IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 1–11. PARTITION.

INFANTS.

Disabilities. See JUDGMENT, 1–4. MASTER AND SERVANT, 30–32.

Same: Estoppel.

1. A minor may by his own fraud estop himself from avoiding a contract on the ground of infancy; but (except, perhaps, in some extreme cases) he cannot do so unless he had actual, though not legal, discretion, and was guilty of actual fraud, as by express representation of capacity to contract, inducing the other party to enter into the agreement, nor unless the contract was beneficial to the minor. *Grauman, Marx & Cline Co. v. Krienitz,* 556
2. Thus, a minor is not estopped, even by actual fraud, from avoiding a contract not beneficial to him, as in the case of his having become a mere surety or accommodation maker of a promissory note. *Ibid.*

Custody and protection. See PARENT AND CHILD.

INJUNCTION.

Nature and grounds. See MUNICIPAL CORPORATIONS, 15.

Subjects of protection and relief: Enforcement of criminal laws.

1. As a general rule, equity will not enjoin enforcement of the criminal law; but where property rights are being destroyed or threatened with destruction by action under a void ordinance or law, courts of equity will take jurisdiction to prevent the injury or destruction in a proper case, where the injured person would have no other adequate remedy. *Benz v. Kremer,* 1
2. In an action to enjoin enforcement of a criminal statute alleged to be unconstitutional, if the only provision thereof which affects plaintiff injuriously can stand as a valid enactment independent of the other provisions, such other provisions, whether constitutional or not, are immaterial in the action. *Ibid.*

Actions: Interurban railways.

3. Acquiescence by the owners of city lots for about nine years in the running of interurban cars upon the tracks of a city railway in front of their lots did not estop them from obtaining relief by injunction against such unlawful taking of their property, under the facts, stated in the opinion. *Schuster v. Milwaukee E. R. & L. Co.* 578
4. When land is being taken by a railway company for public use without compensation in cases not covered by the statutes, the landowner is entitled as a matter of right, and not as a mere matter of grace, to an injunction restraining such taking. *Ibid.*
5. Where the landowner has been guilty of laches, a court of equity has power in some cases to decree compensation in lieu of the injunction, particularly where his damages are comparatively small and those of the other party great, and where public interests would be injuriously affected by the injunction. *Ibid.*
6. This rule of equity is limited as above, and also to cases in which the illegality of the defendant's act consists only in taking or damaging the plaintiff's property without compensation, and cannot be applied where, after such compensation is made, the act sought to be done on condition of making compensation is still contrary to law. *Ibid.*

INSTRUCTIONS TO JURY.

Form, requisites, and sufficiency. See APPEAL, 13, 14. ASSAULT AND BATTERY, 4.

1. An instruction to the jury which correctly states the law in the abstract will not work a reversal merely because there was no evidence to which it was applicable. *Raether v. Mentor,* 238
2. Reviewing the evidence at length in the charge to the jury, even though not advisable, is not error if the evidence is stated correctly. *Beilfuss v. State,* 665
3. Inadvertent misstatements in the charge to the jury as to what the evidence tends to prove, promptly called to the attention of the court and corrected by him so that the jury could not have been misled or influenced thereby, do not warrant a reversal of the judgment. *Ibid.*

Same: Requests for instructions. See CRIMINAL LAW, 3. FRAUD, 7. INSTRUCTIONS TO JURY, 17.

4. Where the jury found that the defendant had actual knowledge of a defect in a highway in time to repair it, alleged errors in refusing requested instructions relative to nonliability for defects caused by the sudden action of the elements, or for latent defects, are immaterial. *Kortendick v. Waterford,* 413
5. Refusal of a requested instruction which would be proper if the verdict were a general one, but which is not germane to any question in the special verdict, is not error. *Ibid.*
6. Refusal to give a requested instruction is not prejudicial to the party requesting it when by such refusal he is relieved of the burden of proving a certain fact. *Schumacher v. Tuttle P. Co.* 631
7. Requested instructions correctly placing the burden of proof as to material questions in the special verdict should be given. *Ibid.*

Particular actions, facts, and subjects:

Accidents.

8. A charge that by the term "accident," as used in a special verdict, was meant "the infliction of the alleged injury to plaintiff's horse at the time and place in question," though not happily worded, was not prejudicial to defendant. *Kortendick v. Waterford,* 413

Admissions. See ASSAULT AND BATTERY, 3.

Arguments of counsel.

9. Where the district attorney denied having made a statement in argument attributed to him by defendant's counsel, and the court, not knowing whether he made it or not, instructed the jury to disregard it if made, no error is shown. *Beilfuss v. State,* 665

Burden of proof. See APPEAL, 14. MORTGAGES, 3.

Highways.

10. Given in connection with a question in the special verdict, "Was there a defect in the highway at the time and place in question?" a charge that "by a defect in the highway is meant any condition that renders the highway not reasonably safe for travelers who exercise ordinary care in traveling upon it," was

correct and was not prejudicial because not qualified by phrases referring to negligence of the town or notice of the defect. *Kortendick v. Waterford,* 413

Master and servant. See MASTER AND SERVANT, 23.

11. An instruction that if defendant failed to use such care to provide plaintiff with a safe place to work as the great mass or majority of *employers* under similar circumstances would ordinarily use, then the place furnished was not reasonably safe, was not erroneous in that the word "employers" was used instead of "mankind." *Gierczak v. Northwestern Fuel Co.* 207

12. It was proper in such case to instruct the jury that, in determining whether defendant furnished a reasonably safe place to work, the jury might consider the opportunity or lack of opportunity to guard and protect men working in the hold of the vessel, the precautions taken in that regard, the nature of the appliances above the hatchway, the manner of making the change in the apparatus, the fact that no rules as to warning the men of the change had been made, and that no warning was in fact given to the plaintiff. *Ibid.*

Negligence.

13. In charging the jury respecting question No. 12 of the special verdict, which asked whether defendant's failure to give proper warning was the proximate cause of plaintiff's injury, the trial judge referred twice to "this question No. 12." He defined proximate cause, and stated that plaintiff contended that such failure to give warning was the proximate cause of the injury, but that defendant contended that the proximate cause was plaintiff's own negligence and carelessness, and then said: "The burden of proof on this question is on the defendant." *Held,* that the words "this question" in the last statement must have been understood by the jury as referring, not merely to defendant's contention as to plaintiff's negligence, but to the question in the special verdict which they were required to answer; and the charge was therefore erroneous, the burden of proof as to such question being on the plaintiff. *Schumacher v. Tuttle Press Co.* 631

Self-defense.

14. An instruction to the effect that the law limits the right of self-defense to necessity as it reasonably appears to the defendant at the time, and that in acting upon appearances and in taking the life of his fellowman a person acts at his peril and will not be excused unless the circumstances proven were such as would reasonably cause him to believe his act necessary to save his own life or to save himself from great personal injury, was appropriate to this case and not erroneous. *Bradley v. State,* 137

15. So, also, upon the evidence in this case it was proper to instruct that if defendant was in fault in creating the situation of danger his right of self-defense did not arise until he had done all he could reasonably do to avoid the necessity of killing the deceased in order to protect himself. *Ibid.*

Sidewalks.

16. An instruction that a lotowner was not responsible for any negligence or default, with reference to the sidewalk in question, of contractors erecting a building on his lot, was harmless in this

case, even if not correct, there being no evidence that there was any necessity for the contractors to interfere with the walk at the point in question, or that they did interfere with it or create the defect, and the jury having found in effect that the defect existed before such contractors began work. *Raether v. Mentor*, 238

Witnesses: Credibility.

17. An instruction as to matters to be considered by the jury in determining the credibility of witnesses, if correct as far as it goes, is not erroneous merely because it omits some matters which might properly be considered. If further or more explicit instructions are desired in such a case, they should be requested. *Schmitt v. Milwaukee*, 89 Wis. 195, distinguished. *Anderson v. Sparks*, 398

INTENT. See ELECTIONS, 2–5.

INTEREST.

Where a contract for certain work was performed by plaintiff prior to the time fixed therein except as to one item, and as to that the work, being unsatisfactory, was by agreement redone at plaintiff's expense some months later, the performance was not completed until the later date, and plaintiff is entitled to interest on the contract price from such later date only. *Associated Artists v. Clement*, 490

INTERSTATE COMMERCE. See CORPORATIONS, 12.

INTERURBAN RAILWAYS. See INJUNCTION, 3–6.

JOINTURE. See HUSBAND AND WIFE, 3.

JUDGMENT.

Docketing. See JUDGMENT, 7, 8.

By default: Infants: Opening or setting aside default.

1. An application to vacate a judgment by default against a minor on the ground that he was not represented by a guardian *ad litem* is addressed to the sound discretion of the court, guided, however, by the settled policy of the law that a person under disability is entitled to reasonable opportunity to be heard in court by a qualified representative during his disability, or by himself after the disability shall have been removed. *Grauman, Marx & Cline Co. v. Krienitz*, 556

2. Neither mere acquiescence by the minor while under disability nor mere inconvenience and cost of litigation to the adverse party is sufficient to justify the denial of such an application. *Ibid.*

3. A judgment by default rendered against a minor properly served with summons but not represented by a guardian *ad litem*, is not void or open to collateral attack, but may be avoided by appeal for error if the minority appears of record, or if not, then only by direct proceeding in the action, seasonably taken, as by motion to set aside the default and permit the minor to defend. *Ibid.*

4. While a judgment against a minor will not necessarily be set aside for irregularity, either during the disability or after it

has been removed, if the minor has suffered no substantial injustice, this rule has no application to a case where there was no liability enforceable against the minor in the first instance. *Ibid.*

Collateral attack. See PROCESS, 3.

Conclusiveness of adjudication. See WILLS, 1.

5. Where a judgment is attacked years after its rendition and after the party attacking it had knowledge of it, every reasonable intendment should be made in favor of the jurisdiction. *Minneapolis Threshing Machine Co. v. Ashauer,* 646

6. The adjudication by the court, in such case, that it had jurisdiction is of strong *prima facie* effect, and the evidence of service of summons which the court had before it is entitled to most liberal construction in favor of the conclusion reached by the court. *Ibid.*

Lien: Priorities.

7. Although a trust in land declared by parol only is wholly unenforceable against the trustee, yet, if voluntarily executed by him at any time, it will become validated as of the date of the original oral agreement, and his deed will relate back to that date and take precedence over any interest meanwhile derived from him by another not an innocent purchaser for value,—in this case over the interest acquired by a purchaser at an execution sale under a judgment against the trustee, docketed after the date of the oral agreement. *Blaha v. Borgman,* 43

8. A binding written contract for the sale of land gives to the purchaser an equitable interest consisting of the right to a conveyance upon performance by him, and where that performance has been completed and the entire consideration paid by him before the docketing of a judgment against the vendor, a subsequent conveyance by the vendor vests title in the purchaser as of the date when he became entitled to the conveyance. *Ibid.*

9. A letter by the owner of land offering to sell it for a certain price, immediately responded to by the mailing to him of such price and a blank deed, all prior to the docketing of a judgment against the vendor, constituted a valid written agreement and performance by the purchaser, so that the deed, though not executed and delivered until after the docketing of such judgment, related back and had priority over the lien of the judgment. *Ibid.*

JURISDICTION. See EMINENT DOMAIN, 17. EQUITY, 1. JUDGMENT, 5, 6. LOGS AND TIMBER, 3. NAVIGABLE WATERS, 2. PROCESS, 1, 3, 4.

JUSTIFICATION. See APPEAL, 2.

LACHES. See CONTRACTS, 35. EQUITY, 6, 7. HUSBAND AND WIFE, 7. INJUNCTION, 5.

LAKES. See NAVIGABLE WATERS, 1, 2.

LAND GRANTS. See PUBLIC LANDS.

LANDLORD AND TENANT.

Leases: Holding over: Renewal of lease.

1. Where the tenant, after the expiration of a term fixed by a lease at one year or less, continues to occupy the leased premises without any new contract, the holding over may, at the option

of the landlord, be considered a renewal of the prior lease for a like period and upon like terms. *Waterman v. LeSage*, 97

2. The presumption of renewal of the lease in such case cannot be repudiated by proof of a contrary intention on the part of the tenant alone. *Ibid.*

3. The parties in such a case may agree that the holding over shall be on different terms or for a different period; and such agreement may be proven like any other parol agreement. *Ibid.*

4. A printed form on the back of rent receipts given to a tenant holding over, stating that the law requires tenants, when no lease has been signed, to give thirty days' notice before vacating, did not constitute a new contract. *Ibid.*

Same: Attornment. See TAX TITLES, 5–8.

Same: Removal of fixtures. See FIXTURES.

LAW OF THE CASE. See APPEAL, 17–20.

LEADING QUESTIONS. See WITNESSES, 1.

LEASES. See FIXTURES. LANDLORD AND TENANT.

LEGISLATIVE POWER. See CONSTITUTIONAL LAW, 3–6.

LETTERS. See EVIDENCE, 2.

LIBEL AND SLANDER.

Privileged communications.

1. In an action for slander when, to establish the defense of qualified or conditional privilege, the defendant has shown *prima facie* that the slanderous communication was made by him to the proper officer of the law (or one honestly believed by him to be the proper officer) in good faith, believing the communication to be true and acting simply from a sense of public duty, the burden of proof is not upon him to show further that he had reasonable grounds for believing the truth of the communication. *Joseph v. Baars*, 390

2. Mere reckless statements, or statements based on nothing in the way of information, cannot be said to have been made in good faith within the meaning of the above rule. *Ibid.*

3. When a *prima facie* case of privilege has been made as above stated the burden is upon plaintiff, as in other cases of communications conditionally privileged, to prove actual malice on the part of the defendant. *Ibid.*

LIENS. See JUDGMENT, 7–9. LOGS AND TIMBER. MECHANICS' LIENS. MORTGAGES, 6, 7. RAILROADS, 1, 2. VENDOR AND PURCHASER.

LIFE ESTATES. See WILLS, 7–9.

LIGHTING PLANT. See MUNICIPAL CORPORATIONS, 13–15.

LIMITATION OF ACTIONS.

Operation and effect of bar by limitation. See TAX TITLES.

When a statute of limitations shall have fully run against a right, the same is extinguished and a new right created of equal dignity with the one destroyed, as regards constitutional protection. *Laffitte v. Superior*, 73

Same: Interruption or suspension. See ADVERSE POSSESSION, 1–3.

LOGS AND TIMBER.

Liens.

1. Where the owner of logs is not personally liable for payment of lienable claims for labor performed on the logs for a contractor, but the logs occupy the position of surety for the payment, such owner is entitled to equitable relief *quia timet* if, by collusion between the claimants and the contractor, who is insolvent, the claimants have refrained from applying on their claims debts due from them to the contractor which are the subject of equitable setoff and would extinguish the claims, and are proceeding to enforce liens upon the logs. *St. Croix Timber Co. v. Joseph,* 55
2. In an action by the owner of logs for such relief the lien claimants must, except for the setoffs, have all the advantages of an attachment of the logs and foreclosure of their liens by separate and independent actions; and if anything is found due to any of them the liens therefor of all those so prevailing will be foreclosed by the judgment and, unless redeemed, a single sale of the logs in their behalf will be directed. *Ibid.*
3. The equitable jurisdiction in such case is supplemented by the jurisdiction to marshal assets as well as to marshal securities. *Ibid.*
4. The foundation of the owner's right to relief in such case being the existence of valid lienable claims against the contractor, from which the logs should be relieved by the application of the offsets, no cause of action is stated against lien claimants whose right to a lien is expressly negatived by the complaint. *Ibid.*
5. The contractor, being the principal debtor, is a necessary party to the action. *Ibid.*
6. Supplies advanced by the owner of the logs to the contractor for his camps having been put by the contractor into a store conducted by himself and a partner and then sold on credit to the lien claimants, and the contractor, after becoming insolvent, having assigned his interest in the goods and the accounts to his partner, who claims to own the same, such partner is, under sec. 2603, Stats. (1898), a proper party to the action. *Ibid.*

Trespass. See PLEADING, 13.

MALICE. See LIBEL AND SLANDER, 3.

MARKET VALUE. See CONTRACTS, 3, 5, 6.

MARRIAGE SETTLEMENTS. See HUSBAND AND WIFE, 1–7.

MARRIED WOMEN. See CONTRACTS, 21, 24, 25. HUSBAND AND WIFE.

MARSHALING ASSETS AND SECURITIES. See LOGS AND TIMBER, 3.

MASTER AND SERVANT.

Scope of employment of servant. See AUTOMOBILES, 1–3.

Master's liability for injuries to servant: Machinery. See MASTER AND SERVANT, 18, 32. RAILROADS, 6, 7.

1. In an action for personal injuries sustained by plaintiff while operating a machine which the complaint alleges was unsafe in several particulars, the special verdict should be so framed that

it will show in which, if any, of such particulars the jury find that the machine was unsafe. *Lillis v. Beaver Dam Woolen Mills,* 128

2. Where injuries to an employee are claimed to have been caused by abnormal action of a machine in starting up suddenly without apparent cause after the drive belt had been shifted to a loose pulley and the machine had come to a full stop, the mere statement of plaintiff that it so started is not sufficient to sustain an inference that there was a discoverable defect in the machine, as against evidence, otherwise undisputed, that the machine had been used for years without any abnormal action and that it was of proper and safe construction and in good repair. *Ibid.*

3. Dangers incident to the operation of a machine which are open and obvious to any person of ordinary intelligence are assumed by a servant who undertakes the employment of operating it. *Stock v. Kern,* 219

4. The fact that a machine whose operation was attended with obvious danger might possibly have been equipped with appliances which would render it less dangerous affords no ground for complaint to one who undertook to operate it, the employer having the right to use such a machine if he thereby violated no positive law and did not expose his employees to hidden dangers. *Ibid.*

5. In an action for an injury sustained by an employee while operating an obviously dangerous machine the burden is upon plaintiff to show that the injury was proximately caused by the alleged negligence of the defendant; and proof which is as consistent with a theory that the injury was due to a cause not actionable as with a theory that it was due to an actionable cause is not sufficient to carry the case to the jury. *Ibid.*

6. The evidence in this case is *held* not to show a causal connection between the alleged negligence of the defendant in running at a slow speed the splitter saw at which plaintiff was working and the injury to plaintiff occasioned by the turning of a stave bolt which he was feeding into the saw and by his hand slipping and coming in contact with the saw. *Ibid.*

Same: Unguarded gearings.

7. An oiler, familiar with the whole situation, who knew the danger of oiling the hoisting machinery in question when it was in operation if the guard railing was not in place, and had been forbidden to go, under such circumstances, through a narrow passage between revolving drums and gears, and who could easily have replaced the guard (which had been temporarily removed) or could have had the machinery stopped for oiling, but neglected to take either of such precautions and was caught by the gears and killed, was as a matter of law guilty of contributory negligence which was the proximate cause of his death. *Blahnik v. Central Coal Co.* 167

Same: Places to work. See INSTRUCTIONS TO JURY, 11, 12. MASTER AND SERVANT, 20–27, 30–32.

8. Evidence, stated in the opinion, is *held* to have warranted a finding by the jury to the effect that the employer's omission to maintain a light over the chute rendered the place dangerous and constituted actionable negligence. *Forseth v. Iron River Lumber Co.* 87

9. Under the circumstances stated, the risk of being injured by a dark boom stick coming down the chute could not be said to be an open and obvious one which the timberman assumed as incident to his duties; nor was he guilty of contributory negligence as a matter of law. *Ibid.*

10. Testimony of a witness in such case that boom sticks had not come through the mill that season, and that they were "pretty hard to see," was relevant and was properly admitted. *Ibid.*

11. Where a master furnishes to a force of employees suitable material to erect a building upon a proper site he is not liable for injuries to one of them resulting from perils created by them in the progress of the construction. *Strehlau v. John Schroeder L. Co.* 215

12. The fall of a loose plank placed near the edge of the floor on the second story of a building in process of erection was not of itself *prima facie* evidence that the place was unsafe, the rule *res ipsa loquitur* being equally effective to establish that the fall of the plank might have been due to the negligence of co-employees of the person injured. *Ibid.*

13. The duty of the master to make the working place of a servant reasonably safe does not cease because of the fact that repairs are in progress upon the structure in which the work is being done, where the servant is not himself participating in the making of such repairs. *Gorsegner v. Burnham,* 486

Same: Rules and regulations. See MASTER AND SERVANT, 22, 23.

Same: Warning and instructing servant. See MASTER AND SERVANT, 22, 23.

14. A master is not bound to give warning of open and obvious dangers to a servant of ordinary intelligence, knowledge, and experience. *Brotzki v. Wisconsin Granite Co.* 380

Same: Foreman. See MASTER AND SERVANT, 22.

Same: Fellow-servants. See MASTER AND SERVANT, 12, 22.

15. The master is liable for injuries to a servant caused by the negligence of a fellow-servant where such negligence was merely concurrent with and rendered effective by a defect in the place of work. *Gorsegner v. Burnham,* 486

16. The positive testimony of two witnesses that the tipping of the heavy cope of a flask in defendant's foundry by which plaintiff was injured was caused by the hook of a chain catching under the flange of the cope is *held* to establish that fact, contrary to a finding of the jury supported only by plaintiff's testimony to the effect that the hook was either hooked in the handle of the cope or caught in the flange, and that he did not know which. *Kraczek v. Falk Co.* 570

17. That the accident was proximately caused by negligence of a fellow-servant of plaintiff in handling the chain which he had just unhooked from the cope, after the cope had been moved by a crane, is also *held* to be established by the evidence, contrary to a finding of the jury. *Ibid.*

Same: Assumption of risk. See MASTER AND SERVANT, 3, 4, 7, 9.

18. An adult of ordinary intelligence and experience who has learned from working in and about a woolen mill and its machines the usual conditions and hazards of the business, must be deemed, as matter of law, to have known the risk incident to putting his hand into a machine (in this case a mixing picker) while it

was running, to remove clogging material. *Lillis v. Beaver Dam Woolen Mills,* 128

19. An employee does not assume a risk unless he knows it or the circumstances are such that one in the exercise of ordinary care ought to know it. *Gierczak v. Northwestern Fuel Co.* 207

20. An adult employee of experience and ordinary intelligence who knows or ought to know that a steel rope is likely to fall from a considerable height into his working place, necessarily knows or ought to know the danger of injury therefrom and cannot escape the consequences of such knowledge by claiming that he did not appreciate the danger or the risk. *Ibid.*

21. Where a shoveler working in the hold of a vessel from which coal was being unloaded was injured by the fall of a steel rope which regularly fell at a certain stage of the work as the result of a change then made in the hoisting apparatus, and there was evidence that notice of the fall of the rope had always been given on previous occasions so far as he knew, but that it was not given at the time in question, it cannot be said as matter of law that he assumed the risk. *Ibid.*

22. Failure, in such case, of the foreman in charge of the unloading operations to give notice or warning of the fall of the rope was not merely negligence of a co-employee, where the employer had not, by rule or otherwise, made any provision for warning being given of the constantly recurring danger. *Ibid.*

23. In such a case, where the only negligence consisted in lack of warning, for which no provision had been made, an instruction that the officers and agents in charge of defendant's business of unloading coal from vessels to docks stood for and represented the defendant, was not erroneous. *Ibid.*

24. A servant assumes the risks ordinarily incident to his employment which are so obvious that he is presumed to know of their existence. *Brotzki v. Wisconsin Granite Co.* 380

25. An employee of ordinary intelligence who had worked in a granite quarry for a number of years as a driller, for two years as helper to a blaster, and for one year as a blaster, must be presumed to have had knowledge of the open and obvious dangers incident to the operation of blasting as it was customarily performed, whether arising from the nature of the business, the particular manner in which it was conducted, or the use of defective or insufficient appliances. *Ibid.*

26. Such an experienced blaster presumably knew the nature and condition of the blast holes as to roughness of the sides and sharp projections of the rocks in the holes, and was chargeable with knowledge that his use of a steel gauge rod in loading the holes might produce a spark by contact with the rock and so cause a premature explosion. *Ibid.*

27. The fact that such blaster had no knowledge of the process and dangers of blasting except what he had acquired while at work in the quarry does not relieve him from the consequences of his assumption of such risk of premature explosion, it being a risk which he must be held to have apprehended and understood. *Ibid.*

28. Where the negligence, if any, of a master which caused injury to a servant consisted in a failure to promulgate a rule requiring

a signal to be given before the moving of a crane, in the operation of which the servant was engaged with others, but it appeared that, although the servant knew that the crane was customarily moved without any signal, he had continued in the work without any protest for several months prior to the injury, the servant must be deemed to have assumed the risk of injury resulting from the moving of the crane without signal. *Kraczek v. Falk Co.* 570

29. The mere fact that the article being handled by the crane at the time of the injury, though of the same sort, was larger and heavier than those which the servant had before assisted in moving, did not so change the character of his employment that it should be held that he did not assume the risk. *Ibid.*

30. A minor servant assumes the risk of open and obvious dangers of work in which he may lawfully be employed. *Schumacher v. Tuttle Press Co.* 631

31. But an inexperienced minor is not always charged with knowledge of risks which might be obvious to an adult, and will not be deemed as matter of law to have assumed such risks unless it appears that he not only knew or ought to have known the proximity of the dangerous agency from which the injury resulted, but also comprehended and appreciated, or ought to have comprehended and appreciated, the extent of the risk to which its proximity subjected him, especially where the situation is obscure or complex. *Ibid.*

32. In an action for injuries to a boy sixteen years old whose hand was caught and crushed between rollers in a rotary printing press, the questions as to whether he knew or ought to have known and comprehended the danger of such injury were, upon the evidence, properly for the jury. *Ibid.*

Liability for injuries to third persons: Acts or omissions of servant. See AUTOMOBILES, 1–3.

MAXIMS.
Res ipsa loquitur, 215, 218.
Res judicata pro veritate accipitur, 156, 234, 237.
Stare decisis, 187, 321, 324, 326, 351, 354, 359.

MEANDERED LAKES. See NAVIGABLE WATERS, 1, 2.

MEASURE OF DAMAGES. See CONTRACTS, 41. DAMAGES, 2–4.

MECHANICS' LIENS.

Subcontractors: "Furnishing" of materials.

1. Mere delivery of materials by a subcontractor to the principal contractor, where such materials neither enter into the structure for which they were intended nor reach the premises or the control of the owner of the structure, does not constitute such a furnishing of the materials as entitles the subcontractor to a lien under sec. 3315, Stats. (1898). *Francis & Nygren F. Co. v. King Knob C. Co.* 619

Waiver.

2. The giving of credit, by one entitled to a mechanic's lien, for a reasonable time but not to a definite date beyond the period fixed by law for commencing the lien action, does not *per se* waive the lien. *Thien v. Brand,* 85

Foreclosure.

3. In an action to foreclose a mechanic's lien defendant may set off a demand for the amount of plaintiff's board furnished him in the course of the work. *Ibid.*

4. The error, if any, in striking out a counterclaim for such demand was not prejudicial where plaintiff recovered only the value of his services over and above the board so furnished, so that the defendant had the full benefit of his demand by way of defense. *Ibid.*

MISDEMEANORS. See CRIMINAL LAW, 2.

MISTAKE. See ADVERSE POSSESSION, 4. CONTRACTS, 31–36. PARTITION, 2.

MORTGAGES.

Equity of redemption: Extinguishment by deed to mortgagee.

1. Though an arrangement between mortgagor and mortgagee by which the equity of redemption is apparently extinguished will be closely scrutinized and it must appear that the consideration was adequate and that no advantage was taken of the mortgagor's necessities, and though in doubtful cases the courts incline to hold that the mortgage relation still exists, nevertheless such an arrangement will be sustained if fairly made. *Coates v. Marsden,* 106

2. Where the mortgage relation has been apparently terminated by an absolute deed from mortgagor to mortgagee, but the mortgagor claims the excess obtained by the mortgagee, over and above the mortgage debt, on a subsequent sale of the premises, the burden of proof is upon the mortgagor, whether he bases his claim upon an express contract to pay such an excess to him or upon continuance of the mortgage relation either by agreement between the parties or because advantage had been taken of his necessities. *Ibid.*

3. Where in such case the mortgagor's complaint alleged an express contract for payment to him of any excess received on the sale, an instruction to the jury that the controlling question in the case was whether the parties intended to cancel the mortgage debt and that upon this question the burden of proof was on the defendant, was confusing and erroneous. *Ibid.*

Same: Deed by mortgagee: Purchase-money lien: Foreclosure.

4. A deed by which a mortgagee conveys to the mortgagor or owner of the equity of redemption all the estate, right, title, interest, claim, or demand in law or in equity of the mortgagee in and to the mortgaged land, operates to satisfy and discharge the mortgage and cannot be contradicted by evidence of a contemporaneous parol agreement that the mortgage shall not be affected thereby. *Latton v. McCarty,* 190

5. Discharge of a mortgage securing an unpaid balance of purchase money of the land does not *per se* establish payment of such balance, and it may be shown that it was not paid. *Ibid.*

6. In an action to foreclose a mortgage securing purchase money, if it appears that the mortgage has been discharged but that the purchase money has not been paid, the court may enforce plaintiff's right to a vendor's lien, treating the complaint as amended to conform to the facts proved. *Ibid.*

7. A judgment in such case decreeing foreclosure of the mortgage and sale of the land is permitted to stand after striking therefrom the award of attorney's fees and the direction for a deficiency judgment, since as thus modified it accomplishes the same result as a judgment enforcing the vendor's lien, on terms more favorable to the defendant than are usually imposed. *Ibid.*

Satisfaction. See MORTGAGES, 4–7. PARTITION.

Foreclosure: Attorney's fees. See MORTGAGES, 7.

8. The services of an attorney within the presence and knowledge of the court being themselves evidence from which the court might fix their value, the allowance of a reasonable attorney's fee upon foreclosure of a mortgage without further evidence was, if error, not prejudicial. *Voechting v. Grau*, 55 Wis. 312, distinguished. *Larscheid v. Kittell*, 172

MUNICIPAL CORPORATIONS.

Ordinances. See INJUNCTION, 1, 2.

Public improvements: Contracts: Ultra vires.

1. A contract for the erection of a schoolhouse for a city of the fourth class, which, in disregard of statutory requirements, was entered into by the school board instead of by the board of public works and was not countersigned or indorsed by the comptroller nor signed on behalf of the city by the mayor and city clerk, was not valid or binding upon the city. *Hoeppner-Bartlett Co. v. Rhinelander*, 229

2. A resolution adopted by the common council in such case, authorizing the school board to construct the schoolhouse, was not a valid substitution of the school board for the board of public works, where the council at no time determined, pursuant to sec. 925—78, Stats. (1898), that the school board should constitute the board of public works, and never by any official action attempted to dispense with the board of public works and itself assume the functions of that board. *Ibid.*

3. Acceptance of the schoolhouse by the city in such case did not operate to ratify the acts of the school board so as to make the contract binding upon the city. *Ibid.*

Same: Sidewalks: Special assessments.

4. In the exercise of the police power a city may construct a sidewalk and charge the expense to the adjacent lot regardless of benefits; but the XIVth amendment to the federal constitution is applicable, and the lotowner must not be deprived of his property without due process of law. *Eiermann v. Milwaukee*, 606

5. Under the charter of the city of Milwaukee (sec. 17, ch. VII), authorizing the board of public works to declare any sidewalk dangerous, and to employ any person to repair or relay it at a fair price, and to assess the expense upon the abutting land, it is the duty of the city to see that the contract for the work is fairly made at a reasonable price, with due regard to the lotowner's interest, and that it is substantially performed. *Ibid.*

6. When in such a case a substantial walk is contracted for at a reasonable price, acceptance by the city of a substituted and worthless walk is not conclusive upon the lotowner, even though

the walk was accepted through mere negligence and inattention and without actual fraud. *Ibid.*

7. If the walk as accepted by the city is so defective or incomplete that a reasonable man cannot honestly say that there has been a substantial performance of the contract, there is in a legal sense a fraud upon the lotowner, and he is entitled to relief against the special assessment. *Ibid.*

8. Proof of notice to the city officials of the defective character of the walk before its acceptance is not necessary to establish the cause of action, but merely tends to aggravate the fraud. *Ibid.*

9. In an action against the city to set aside a special assessment for a sidewalk, if evidence that the city officials had notice, before its acceptance, of the defective character of the work was inadmissible because the complaint did not allege that fact, but such evidence was in fact admitted and before the court, the complaint should, upon proper terms, have been amended to conform to the proof. *Ibid.*

10. Where the city has paid the contractor for constructing the sidewalk and is the owner of the improvement certificate against the property, the contractor is not a necessary party to an action against the city to set aside the special assessment because of the defective character of the work; but the city may have him brought in as a proper party. *Ibid.*

[11. Whether the plaintiff, if he prevails in such an action, is entitled to have the assessment set aside and the assessment certificate canceled unconditionally, or should be required as a condition of relief to pay what the sidewalk was reasonably worth, not determined.] *Ibid.*

Use and regulation of streets. See EMINENT DOMAIN, 9–13.

Defects and obstructions in streets: Sidewalks: Notice of defect. See INSTRUCTIONS TO JURY, 16.

12. In an action against a town for injuries caused by a loose plank in a sidewalk, evidence that the walk had been in that condition for ten or twelve days and that during that time the town officers were frequently upon the street in question, was sufficient to sustain a finding by the jury that by the exercise of ordinary care the town officers could have discovered and remedied the defect before the accident. *Raether v. Mentor,* 238

Fiscal management, public debt, and securities: Submission to voters.

13. The power of a city of the first class to issue bonds for a municipal lighting plant is conditioned upon the general approval of such issue by the electorate, provided for in sec. 943, Stats. (1898), and a proposition for the issue of bonds under that section must by reasonable intendment include the amount thereof, or at least the maximum amount which is to be approved by the electors. *Neacy v. Milwaukee,* 590

14. In cities of the first class, bonds for a municipal lighting plant can be issued only for the construction or purchase of the plant, there being no authority for their issuance to defray expenses of its maintenance. *Ibid.*

15. A proposition to issue bonds for $500,000 "to erect *and maintain*" a municipal lighting plant, approved by the electors in a city of the first class after the city engineer had made a report that a plant could be erected for $250,000, is so ambiguous that it can-

not be said with reasonable certainty that the electors authorized the issue of bonds to any specific amount for the *construction alone* of the plant, nor can it be said that they were not induced to vote in favor of such issue by reason of their approval of the issue of the bonds for purposes of maintenance. The issuance of any part of such bonds is therefore unauthorized and may be enjoined. *Ibid.*

NATURALIZATION. See CLERKS OF COURTS, 2–4.

NAVIGABLE WATERS.

Meandered lakes: Drainage.

1. Ch. 64, Laws of 1871, authorizing the draining of marsh, swamp, or overflowed land, etc., did not authorize the construction of a ditch which would lower the level of a meandered lake, navigable under sec. 1596, Stats. (1898). *Runyard v. Oetting Bros. Ice Co.* 471
2. Property owners upon a navigable lake have the right to have the natural level maintained, and also to have the assistance of a court of equity, if necessary, to accomplish that end. *Ibid.*

Drawbridges: Rules governing opening: Publication: Custom.

3. The rules and regulations concerning the opening of drawbridges, authorized to be made by the secretary of war under the River and Harbor Act of August 18, 1894, and required to be published in order to have the force of law, cannot be held, as a matter of law, to have been published, upon evidence of mere delivery to a government officer of a limited number of copies with instructions to deliver them to the commanding officers of vessels touching at a certain port, when it affirmatively appears that neither the captain of the vessel in question nor other captains plying those waters had any notice of such rules. *Fugina v. Chicago & N. W. R. Co.* 144
4. In the absence of publication of rules and regulations of the War Department bearing upon the subject, it is competent to prove a custom, existing for seven years, to the effect that an approaching boat blew its whistle only when a drawbridge was closed, as a signal to open it, but not when the bridge was already open. *Ibid.*

NECESSARY PARTIES. See LOGS AND TIMBER, 5. MUNICIPAL CORPORATIONS, 10.

NEGLIGENCE.

Acts and omissions constituting negligence. See APPEAL, 12. AUTOMOBILES. CARRIERS. CONTRACTS, 36. DAMAGES, 3, 4. INSTRUCTIONS TO JURY, 10–13. MASTER AND SERVANT. RAILROADS, 3–7. RELEASE, 6. STREET RAILWAYS. TRIAL, 5.

1. Actionable negligence is not shown unless it appears that the person sought to be charged therewith had knowledge, actual or imputed, that his act or omission complained of was likely to cause injury or damage. *Wickert v. Wis. Cent. R. Co.* 375
2. Such knowledge is imputed, among other instances, where a person of ordinary care and prudence under the same or similar circumstances ought to have known the likelihood of injury. *Ibid.*

3. In an action for personal injuries caused by defendant's negligence plaintiff need not, in order to make a *prima facie* case, show affirmatively that he himself was free from contributory negligence. *O'Malley v. Dorn*, 7 Wis. 236; *Chamberlain v. M. & M. R. Co.* 7 Wis. 425; and *Dressler v. Davis*, 7 Wis. 527, so far as they hold to the contrary, overruled. *Pfeiffer v. Radke*, 512

4. Evidence tending to show that upon a traveled track twenty-two feet wide with a ditch on each side plaintiff had driven his single horse as far to the right as he could, and had stopped, as defendant approached in his automobile; that defendant could have kept wholly to the right of the center of the road, but instead of doing so turned his machine to the left and passed so close to plaintiff's buggy that there was but from one to two feet between the wheel track of the buggy and that of the car; that water and slush were splashed toward the horse as the car passed; and that the horse, though ordinarily not afraid of automobiles, suddenly lurched and overturned the buggy, is *held* sufficient to sustain a verdict to the effect that defendant was negligent and that his negligence proximately cause the injury. *Ibid.*

Proximate cause of injury. See AUTOMOBILES, 6. INSTRUCTIONS TO JURY, 13. MASTER AND SERVANT, 5, 17. NEGLIGENCE, 4.

Contributory negligence. See AUTOMOBILES, 5, 6. CONTRACTS, 36. MASTER AND SERVANT, 7, 9. NEGLIGENCE, 3. RAILROADS, 7. RELEASE, 6.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. CONTRACTS, 24, 25, 38. INFANTS, 2. PAYMENT, 1, 2.

NEW TRIAL.

1. It is not an abuse of discretion to deny a motion for new trial based on newly discovered evidence, where such evidence is merely cumulative. *Lemke v. Hage*, 178

2. A new trial asked on the ground of newly discovered evidence may properly be denied where there was a want of due diligence to discover such evidence. *Anderson v. Sparks*, 398

NOMINAL DAMAGES. See DAMAGES, 1.

NOMINATIONS. See ELECTIONS, 6–10.

NONSUIT. See APPEAL, 6. RAILROADS, 6.

NOTICE.
Of claim. See RAILROADS, 1, 2.
Of defect in highway. See EVIDENCE, 1. HIGHWAYS. MUNICIPAL CORPORATIONS, 8, 9, 12.
Of distraint. See ANIMALS.

OFFICERS. See CLERKS OF COURTS.

OPINION EVIDENCE. See APPEAL, 12. EVIDENCE, 5, 6.

ORDINANCES. See INJUNCTION, 1, 2.

PARENT AND CHILD.

If a father has the ability to maintain his minor children, his offer to support them if surrendered to his custody by his wife does not relieve him from liability for their support, even

though they are improperly detained from him by the wife. *Beilfuss v. State,* 665

PAROL EVIDENCE. See CONTRACTS, 10. DEEDS, 3, 4. EVIDENCE, 2, 3. LANDLORD AND TENANT, 3.

PARTITION.

Reimbursements for improvements: Husband and wife.

1. In an action for partition of land the claim of a defendant for reimbursement, out of the proceeds of a sale of the premises, for moneys expended by him as a tenant in common in making permanent improvements enhancing the value of the land and in discharging a mortgage thereon, is pleadable as a counterclaim. *Scheiner v. Arnold,* 564
2. One who paid off a mortgage on his wife's land and expended moneys in permanent improvements thereon during her life under the mistaken impression that he was a joint owner has no claim legal or equitable to reimbursement which can be allowed in an action for partition of the land among the heirs of the wife, in the absence of any agreement that he was to be reimbursed or of facts showing that he was to be subrogated to the rights of the mortgagee. *Ibid.*

PARTNERSHIP. See PLEADING, 4.

PART PERFORMANCE. See HUSBAND AND WIFE, 5, 6.

PARTIES. See LOGS AND TIMBER, 5, 6. MUNICIPAL CORPORATIONS, 10.

PASSENGERS. See RAILROADS, 3, 4. STREET RAILWAYS.

PATENTS. See PUBLIC LANDS.

PAUPERS.

1. Under sec. 1499, Stats. (1898), a distinction exists between that degree of poverty and indigence which will entitle one to support from the town and that which will entitle him to temporary relief in emergency. *Coffeen v. Preble,* 183
2. Where the necessity for aid is urgent and the afflicted person poor, indigent, and helpless to such a degree that obtaining a relief without town aid in time to save life or health may be impossible, it cannot be said as matter of law that he is not entitled to relief from the town merely because he possesses some meager property not immediately available for conversion into cash or as a basis of credit. *Ibid.*
3. It was a question for the jury in this case whether a family consisting of father, mother, and minor son, all of whom were ill with typhoid fever and bedridden, were entitled to relief from the town, although they owned a homestead worth $725, subject to a mortgage not exceeding $450, and had about $7 in money and some credit at a grocery. *Ibid.*

PAYMENT.

See MORTGAGES, 3, 5.

1. In an action upon a promissory note where the defense is payment the burden of proof is upon the defendant. *Drake v. Drake,* 602
2. A receipt or release signed by one not shown to have had authority from the payee of a note is not competent evidence of payment. *Ibid.*

3. The decision of the trial court that plaintiff's husband, to whom defendant claimed to have paid the note in suit, had no authority to receive such payment, is *held* to be supported by the evidence. *Ibid.*

PERFORMANCE. See CONTRACTS, 14–25. HUSBAND AND WIFE, 5, 6. INTEREST.

PERPETUITIES. See WILLS, 2–6.

PERSONAL INJURIES. See APPEAL, 12. DAMAGES, 3, 4. EVIDENCE, 1, 4. INSTRUCTIONS TO JURY, 4, 8, 10–13, 16. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 12. NEGLIGENCE. PLEADING, 7. RAILROADS, 3–7. RELEASE, 1, 9. STREET RAILWAYS. TRIAL, 4–6.

PETITION. See ELECTIONS, 10. EMINENT DOMAIN, 9, 10.

PHOTOGRAPHS. See EVIDENCE, 4.

PHYSICIANS AND SURGEONS. See EVIDENCE, 5.

PLEADING.

Complaint: Sufficiency of allegation. See EMINENT DOMAIN, 9, 10.

1. Performance on plaintiff's part of a contract in respect to which relief is sought need not be alleged if the complaint shows that such performance was wrongfully prevented by defendants. *Bannen v. Kindling,* 613
2. Where the complaint definitely sets forth the contract in suit it need not, even where specific performance is prayed, also allege in detail just what would be required to execute it, if those matters can be made certain by proof. *Ibid.*
3. If the facts stated in the complaint, expressly and inferentially, upon any reasonable view, entitle the plaintiff to any judicial relief in equity against all or any of the defendants who join in a general demurrer, though it be not the relief specifically prayed for, or though the cause of action be not the one the pleader supposed he had and intended to state, and regardless of mere indefiniteness of statement, it is sufficient. *Ibid.*
4. Where the complaint shows that plaintiff has a right to have a partnership agreement carried out, or to have the partnership wound up, the objection that he has an adequate remedy at law is untenable. *Ibid.*

Same: Construction. See CORPORATIONS, 5. EMINENT DOMAIN, 9, 10. MORTGAGES, 3. PLEADING, 10–13. TRIAL, 1, 2.

5. In a complaint a general averment of performance of a contract on the part of the plaintiff is overcome by detailed and specific facts therein stated which show a failure of performance. *Collat v. Gottschalk,* 503
6. Where a party to a contract agreed that he would exchange with a corporation, not a party to the contract, certain shares of stock in other corporations named, not parties to the contract, for 73,750 shares of the stock of the corporation first mentioned, and that said shares so received by him should be held in trust by a designated third person, performance on his part is not shown by an averment that he received only 63,750 shares in exchange and failed to deposit any of these in trust because the other parties to the contract, though having the power so to do,

failed and refused to procure for him the remaining 10,000 shares, there being no express agreement by such other parties to procure such shares for him. *Ibid.*

Answer: Admissions.

7. Where a complaint alleges that plaintiff was injured on a certain date while he was in the employ of defendant, that the defendant is a corporation, and that on said date it owned and operated the foundry in which the injury occurred, admissions in the answer that defendant is a corporation and that plaintiff was injured at the time and place alleged are consistent with proof that, even if incorporated prior to the date mentioned, defendant was not then doing business nor the owner of nor operating the foundry in question, and that plaintiff was not then in its employ. *Ziemer v. C. G. Bretting Mfg. Co.* 224

8. The admission in such case by the president of the defendant corporation, when notice of injury was served upon her, that she was such president, does not estop defendant from denying liability upon the ground that at the time of the injury it was not operating the foundry in question; and the mere fact that the name of the corporation is the same as that under which the foundry had been formerly conducted by its president as an individual does not render the corporation liable, where plaintiff was not in any way misled as to the identity of his employer either by the president or by any other member of the corporation. *Ibid.*

Counterclaim. See MECHANICS' LIENS, 4. PARTITION, 1. SALES, 1.

9. In a tort action a counterclaim must arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or be connected with the subject of the action; and as against an oral demurrer this connection must appear from the counterclaim itself or from it and the complaint taken together, and cannot be shown by extrinsic evidence which has been offered by plaintiff in support of his case. *Winkler v. O'Donovan,* 412

Demurrer. See CORPORATIONS, 5. PLEADING, 3, 9.

10. A general demurrer to a complaint will be overruled if a cause of action is stated as to some, though not all, of the defendants joining in such demurrer. *St. Croix T. Co. v. Joseph,* 55

11. In an action by the grantee in a warranty deed against the grantor for breach of covenants by reason of prior conveyances, the court will not presume, in support of a demurrer to the complaint, that the deed to plaintiff, or a land contract pursuant to which it was given, was recorded at any particular time or that the prior grantees did not take possession or record their conveyances until after plaintiff had or might have recorded his contract or deed. If plaintiff's deed was in fact first recorded and the rights of the prior grantees were thereby cut off, that is defensive matter. *Darlington v. J. L. Gates L. Co.* 198

12. If, by a liberal interpretation of the averments of a complaint, a good cause of action can be gleaned therefrom, a general demurrer should be overruled. *Ibid.*

13. An averment in a complaint that timber was cut and removed during a certain month but not prior to the 15th may, by a liberal interpretation and as against a demurrer, be deemed to allege, though in a vague and indefinite manner, that the timber

was being cut and removed at the time a deed was delivered to plaintiffs on the 25th of that month. *Ibid.*

Prayer for relief. See PLEADING, 3.

14. One entitled to the return of at least a part of a sum deposited by him should not be denied recovery because in his complaint he demands the entire sum. *Donahue v. Gunter,* 465

Verification. See PLEADING, 15.

Amendment. See MUNICIPAL CORPORATIONS, 9.

15. Harmless error in allowing unverified amendments to a verified complaint will be disregarded under sec. 3072*m*, Stats. (Laws of 1909, ch. 192). *Pfeiffer v. Radke,* 512

PLEDGE. See CORPORATIONS, 8.

POLICE POWER. See CONSTITUTIONAL LAW, 9–12. MUNICIPAL CORPORATIONS, 4–11.

POOR PERSONS. See PAUPERS.

POSSESSION. See ADVERSE POSSESSION. TAX TITLES.

POSTNUPTIAL CONTRACTS. See HUSBAND AND WIFE, 2.

PRAYER FOR RELIEF. See PLEADING, 3, 14.

PRESUMPTIONS. See ADVERSE POSSESSION, 8. APPEAL, 1, 5–7. CONTRACTS, 15, 27. ELECTIONS, 5. EMINENT DOMAIN, 11. LANDLORD AND TENANT, 2. MASTER AND SERVANT, 25, 26. PLEADING, 11.

PRIMARY ELECTIONS. See CONSTITUTIONAL LAW, 7, 8. ELECTIONS, 6–10.

PRINCIPAL AND AGENT. See AUTOMOBILES, 1–3. BROKERS.

PRINCIPAL AND SURETY. See APPEAL, 2. INFANTS, 2.

PRIORITIES. See JUDGMENT, 7, 8.

PRIVILEGE. See LIBEL AND SLANDER.

PROCESS.

Service on foreign corporation: Jurisdiction. See JUDGMENT, 6.

1. The acquirement of jurisdiction over the person of a foreign corporation as authorized by subd. 13, sec. 2637, Stats. (1898), by service of summons and notice of object of action by delivering copies thereof "to any agent having charge of or conducting any business therefor in this state," constitutes due process of law. *Minneapolis Threshing Machine Co. v. Ashauer,* 646
2. The word "agent" in such section is to be construed broadly and liberally. *Ibid.*
3. A sheriff's return showing service upon a foreign corporation by leaving copies of the summons and notice of action at an office maintained by the corporation in this state with the person in charge of such office, sufficiently shows the existence of the facts necessary to confer jurisdiction, especially where upon a subsequent collateral attack by the corporation upon the judgment rendered against it no evidence is offered in contradiction of the facts stated in such return or the natural inferences therefrom. *Ibid.*
4. If the facts necessary to confer jurisdiction actually existed, jurisdiction was acquired, however imperfect the evidence of those facts then before the court; and although the record fails to show jurisdiction the necessary facts may be proved in the action in which the judgment is attacked. *Ibid.*

PROMISSORY NOTES. See BILLS AND NOTES. CONTRACTS, 24, 25, 38. INFANTS, 2. PAYMENT, 1, 2.

PROPER PARTIES. See LOGS AND TIMBER, 6. MUNICIPAL CORPORATIONS, 10.

PROXIMATE CAUSE. See AUTOMOBILES, 6. INSTRUCTIONS TO JURY, 13. MASTER AND SERVANT, 5, 17. NEGLIGENCE, 4.

PUBLICATION OF LAWS. See CONSTITUTIONAL LAW, 7.

PUBLIC HEALTH. See CONSTITUTIONAL LAW, 11, 12.

PUBLIC LANDS.

Grants to states for internal improvements: Patents: Taxation.

1. The grant of lands to the state by the act of Congress of April 10, 1866, to aid in the construction of the Sturgeon Bay ship canal was, like all the national land-grant acts, a grant *in præsenti*, leaving nothing to be done, after acceptance of the grant, to pass title in trust, except to segregate the lands from the general public domain by due selection and certification. *Mariner v. Oconto Land Co.* 531

2. When lands so granted to the state are re-granted by it for the purposes of the trust, the full equitable and beneficial title passes to the grantee of the state as soon as the lands are earned by compliance with the conditions of the grant and the facts in that regard are duly determined, and from that time the lands are subject to the taxing laws of the state, whether the legal title has or has not, in form, passed by the patent from the state or general government. *Ibid.*

3. In ch. 105, Laws of 1868 (by which the lands granted to the state by the act of April 10, 1866, were "granted and conferred upon" the Sturgeon Bay and Lake Michigan Ship Canal and Harbor Company), the provision that, upon the filing of a certificate by the governor of the completion of the work, the lands "shall be patented . . . to said company, which shall stand seized and possessed of all said lands as fully as the state can convey the same, and free from any tax for the term of ten years, if so long held by the said company," did not operate to postpone until actual issuance of the patents the passing of full beneficial ownership of the lands with right of disposal, or the commencement of the specified period of exemption from taxation. *Wis. Cent. R. Co. v. Price Co.* 64 Wis. 579, 133 U. S. 496, followed. *Ibid.*

4. After the canal company had acquired such beneficial ownership with right of disposal, a deed by which it granted, bargained, sold, assigned, and quitclaimed all its right, title, and interest in and to such lands, and all right, title, and interest which it then had or might thereafter acquire to select and have patented to it (should its full title fail) other lands in lieu thereof, conveyed, not merely a right to obtain the lands, but the full equitable title and beneficial interest possessed by the company; and such conveyance terminated the exemption of the lands from taxation under the act of 1868. *Ibid.*

5. No tax can be imposed on lands while they remain the property of the United States, or on lands granted by the United States to the state in trust for works of internal improvement as to which the trust has not been executed; but when the trust has been executed and the lands fully earned they may be taxed,

although the patents therefor, which are due, have not been issued. *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, distinguished. *Ibid.*

6. The doctrine that when granted lands have been earned and all conditions precedent to the issuance of patents have been satisfied the title for all practical purposes, including that of taxation, passes into the field of private ownership, having been declared by this court twenty-five years ago, affirmed by the federal supreme court, and again recently declared by this court, has become a rule of property and is not now open to discussion. *Ibid.*

7. Refusal by the state for a number of years to issue patents for certain lands granted by it to the Sturgeon Bay canal company, on the ground that such lands did not pass to the state under the grant made to it by the federal government in aid of said canal, but were owned by the state under a different grant, did not create an estoppel *in pais* precluding the state from treating the lands as subject to taxation during that time. *Ibid.*

PUBLIC POLICY. See CONTRACTS, 19, 20, 23–25.

QUALIFICATION for office. See ELECTIONS, 8.

QUANTUM MERUIT. See CONTRACTS, 41.

QUIA TIMET. See LOGS AND TIMBER, 1.

QUO WARRANTO. See ELECTIONS, 3.

RAILROADS.

Regulation. See CONSTITUTIONAL LAW, 13–15.

Construction: Right of way. See DEEDS, 3–6. EMINENT DOMAIN, 9–16. INJUNCTION, 3–6.

Same: Liability to laborers of contractor.

1. A notice of claim, given pursuant to sec. 1815, Stats. (1898), for the purpose of making a railroad company directly liable for indebtedness of a contractor for labor performed in the construction of the railroad, is *held*, following *Matzewitz v. Wis. Cent. R. Co.* 140 Wis. 643, to have been served upon a proper employee of the company. *Balley v. Wis. Cent. R. Co.* 102

2. Where, in such case, the person who employed the claimant had no contract relations with the railroad company, but was either a foreman or a subcontractor of the principal contractor for the construction work, and the principal contractor had made payments directly to the claimant and other employees so that they might well have assumed that they were working directly for him, a notice, otherwise sufficient, in which the claimant stated that the amount owing him was due from such principal contractor, performed all the functions contemplated by the statute (sec. 1815, Stats. 1898), and was a substantial compliance therewith, even if the claimant's employer was in fact a subcontractor. *Ibid.*

Operation: Injuries to passengers.

3. When a railroad train is stopped at a station for the reception of passengers, the trainmen, in the absence of evidence to the contrary, are justified in presuming that those who board the train are passengers intending to remain thereon and depart from such station. *Wickert v. Wis. Cent. R. Co.* 375

4. Leavetaking and farewells among the members of a group upon a depot platform, not actually heard or noticed by the trainmen, are not sufficient to charge the latter with knowledge as to which members of the group are passengers and which members are friends who are merely taking leave of the passengers. *Ibid.*

5. There was no negligence in giving a signal to start a passenger train, or in starting pursuant to such signal, while a person not a passenger was descending the steps of a car, where the trainmen had no notice or knowledge, actual or imputed, that such person was alighting or intended to alight, but rather had a right to presume that he had boarded the train as a passenger, intending to remain thereon. *Ibid.*

Same: Injuries to employees.

6. In an action against a terminal railway company and also against a fuel company for death of a switchman who was crushed between a switch engine, on the side steps of which he was riding, and a box-car loader operated by the fuel company upon a parallel track, a nonsuit as to the railway company is *held* to have been properly granted, the evidence as to the duties and conduct of the fireman on the engine being insufficient to make it a question for the jury whether he was negligent, as alleged, in failing to keep a lookout ahead and to warn the deceased of his danger. *Fitzpatrick v. Lake Superior T. & T. R. Co.* 65

7. A finding by the jury in such case that it was not customary for the box-car loader to move upon its track opposite to or past the switch engine or cars when the switch engine was moving on its track, was not inconsistent with a finding that deceased was guilty of contributory negligence, there being evidence tending to show that the loader had been brought to a full stop on its track before the engine passed it and that deceased, though familiar with the manner in which the loader was handled, rode in the position he did without looking to ascertain where the loader was; and both such findings are *held* to be sustained by the evidence. *Ibid.*

RAPE.

1. To constitute rape the act must be committed by force and against the will of the female; but where she is rendered insensible through fright, or ceases resistance under fear of death or great bodily harm, the consummated act is rape. *Loescher v. State,* 260

2. A conviction of rape is sustained in this case upon evidence which is *held* sufficient to warrant the jury in finding that the prosecutrix ceased to resist because her will was overcome by threats of great bodily harm. *Ibid.*

RATIFICATION. See CORPORATIONS, 6. MUNICIPAL CORPORATIONS, 2, 3. RELEASE, 2.

REAL PROPERTY. See ADVERSE POSSESSION. APPEAL, 4. COSTS, 1. EASEMENTS. EMINENT DOMAIN. FIXTURES. FRAUD, 1, 2. HUSBAND AND WIFE, 1–7. JUDGMENT, 7, 8. MECHANICS' LIENS. MORTGAGES. PARTITION. PLEADING, 11, 13. PUBLIC LANDS. TAX TITLES. VENDOR AND PURCHASER. WILLS, 2–9.

RECEIPTS. See CARRIERS, 2. PAYMENT, 2.

RECITALS. See CONTRACTS, 11.

RECORDING OF INSTRUMENTS. See DEEDS, 1, 2. PLEADING, 11.

REFERENDUM. See CONSTITUTIONAL LAW, 5–7.

REFORMATION OF INSTRUMENTS. See CONTRACTS, 29–32.

RELEASE.

See CORPORATIONS, 2. PAYMENT, 2.

1. The question of the validity of a written release as a bar to an action for personal injuries was one for the jury, upon evidence tending to show that the writing was signed by plaintiff while he was in bed, weak and suffering from the injuries, and not able to read the paper or hear it when it was read; that he signed at the solicitation of an officer of defendant and upon representations by such officer, and by a friend of plaintiff whom the officer had brought with him, that defendant was not liable in damages and that the money then paid and thereafter to be paid was a mere gratuity; and that plaintiff did not know what he was signing. *Mensforth v. Chicago Brass Co.* 546

2. There could be no ratification or affirmance of such a release without full knowledge of the facts. *Ibid.*

3. There can be no release of a cause of action without unequivocal acts showing expressly or by necessary implication an intention to release. *Ibid.*

4. The acceptance of money by plaintiff after the signing of the release was not an affirmance thereof unless the money was paid in satisfaction of the cause of action or received by plaintiff after he knew or ought to have known that he had a cause of action and that the money was paid in satisfaction of it. *Ibid.*

5. The obtaining of such release under the circumstances stated was a fraud, constructive if not actual, upon plaintiff if he had in fact a cause of action and defendant knew or ought to have known that fact. *Ibid.*

6. Whether plaintiff was guilty of negligence in signing the release without knowledge of its contents was, upon the evidence, a question for the jury. *Ibid.*

7. Where the payment of money by defendant to plaintiff was not understood by either to be in settlement of a disputed liability it was not necessary for plaintiff to return or offer to return the money before suing upon that liability. *Ibid.*

8. Per WINSLOW, C. J., and BARNES, J.: Even if, in this case, defendant paid the money upon the understanding that it was in settlement of plaintiff's claim, yet if plaintiff without negligence accepted the money in the belief that it was a mere gratuity, and such belief was induced either by defendant's actual fraud or by its failure to explain properly the true character of the release, defendant cannot be heard to say that the money was paid in settlement of the liability. *Ibid.*

9. It appearing from the evidence that plaintiff, an Italian who was ignorant of English, understood the Italian spoken by an interpreter through whom the terms of a settlement of his claim against defendant for personal injuries were arranged, testimony as to differences in Italian dialects, offered for the pur-

pose of showing that he did not fully understand the interpretation of a release signed by him, was properly excluded. *Demark v. Milwaukee E. R. & L. Co.* 624

10. That the contents of such release were not misstated or misinterpreted to plaintiff, and that he was not coerced or otherwise misled into signing the paper, is *held* to be shown by the evidence. *Ibid.*

11. To impeach a formal written instrument on the ground that its execution was procured by coercion or fraud, the proof should be clear and convincing beyond reasonable controversy. *Ibid.*

12. In reviewing evidence which the trial court held did not present any question for the jury as to the impeachment of a formal writing, weight should be given to the opinion of the trial judge who saw the witnesses. *Ibid.*

REMARKS OF COUNSEL. See INSTRUCTIONS TO JURY, 9.

REPAIRS. See MASTER AND SERVANT, 13.

REPLEVIN. See ANIMALS. COSTS, 1.

REQUESTS FOR INSTRUCTIONS. See CRIMINAL LAW, 3. FRAUD, 7. INSTRUCTIONS TO JURY, 4–7, 17.

RESCISSION. See CONTRACTS, 33–36.

RESERVATIONS. See DEEDS, 3–7. EASEMENTS. FIXTURES, 1.

RES JUDICATA. See JUDGMENT, 5, 6. WILLS, 1.

RIGHT OF ASSEMBLY. See CONSTITUTIONAL LAW, 8.

RIGHT OF PETITION. See ELECTIONS, 10.

RIGHT OF WAY. See DEEDS, 3–6. EMINENT DOMAIN, 9–16. INJUNCTION, 3–6.

RULE OF PROPERTY. See PUBLIC LANDS, 6.

RULES AND REGULATIONS. See MASTER AND SERVANT, 23. NAVIGABLE WATERS, 3, 4.

SALARY. See CLERKS OF COURTS.

SALES.

Construction of contract. See BROKERS.

On credit. See CORPORATIONS, 4. CONTRACTS, 7, 8.

Executory contracts: Remedy for breach. See CONTRACTS, 1–8.

Written order: Ambiguity: Varying terms. See CONTRACTS, 9, 10.

Implied warranty of fitness.

1. In an action for the sale price of an article, if the defendant counterclaims for a total breach of warranty of fitness, pleading tender back of the article, and on the trial wholly defeats plaintiff's claim, it is irregular for the jury to pass upon the title to such article, and a finding in that regard should be treated as surplusage. *La Crosse Plow Co. v. Brooks,* 640

2. If a person orders of another a known and described article and obtains it, he takes the same without implied warranty that it will prove suitable for the use designed, or his use. *Ibid.*

3. If in addition to circumstances in the last foregoing proposition the purchaser, upon ordering the article, states to the dealer the purposes for which he desires the article, that does not

change the rule that upon stating the exact subject of his purchase he takes without implied warranty of suitableness for the particular purpose. *Ibid.*

SATISFACTION. See MORTGAGES, 4–7.

SCHOOLS AND SCHOOL DISTRICTS. See MUNICIPAL CORPORATIONS, 1–3.

SELF-DEFENSE. See HOMICIDE. INSTRUCTIONS TO JURY, 14, 15.

SENATORS, UNITED STATES. See ELECTIONS, 9, 10.

SERVICE.
Of notice. See RAILROADS, 1, 2.
Of process. See JUDGMENT, 6. PROCESS.

SERVITUDE. See EASEMENTS. EMINENT DOMAIN, 14.

SETOFF. See LOGS AND TIMBER, 2. MECHANICS' LIENS, 3.

SETTLEMENT. See ADVERSE POSSESSION, 2, 3.

SHERIFFS. See PROCESS. STIPULATIONS.

SIDEWALKS. See INSTRUCTIONS TO JURY, 16. MUNICIPAL CORPORATIONS, 4–12.

SLANDER. See LIBEL AND SLANDER.

SPECIAL ASSESSMENTS. See MUNICIPAL CORPORATIONS, 4–11.

SPECIAL VERDICT. See AUTOMOBILES, 6. INSTRUCTIONS TO JURY, 5, 7–8, 10, 13. MASTER AND SERVANT, 1. TRIAL, 6.

SPECIFIC PERFORMANCE. See PLEADING, 2.

STAKEHOLDER. See STIPULATIONS, 2.

STARE DECISIS. See CONSTITUTIONAL LAW, 1, 5.

STATES. See PUBLIC LANDS.

STATUTE OF FRAUDS. See HUSBAND AND WIFE, 1–7.

STATUTE OF LIMITATIONS. See ADVERSE POSSESSION, 1–3. LIMITATION OF ACTIONS. TAX TITLES.

STATUTES.

Enactment: Publication. See CONSTITUTIONAL LAW, 7.

In sec. 329, Stats. (1898), providing that all general laws shall be published immediately after their passage and approval, the word "approval" refers to executive approval. *State ex rel. Van Alstine v. Frear,* 320

General or local. See CONSTITUTIONAL LAW, 5, 6. STATUTES.

Amendment and repeal. See COSTS, 3.

Constitutionality. See CONSTITUTIONAL LAW.

Construction. See ANIMALS. APPEAL, 1, 2, 7. CLERKS OF COURTS, 1, 3. CONTRACTS, 13. CONSTITUTIONAL LAW, 7, 8, 12. CORPORATIONS, 4, 12. COSTS, 4. DIVORCE, 7, 8. ELECTIONS, 4, 6–9. EMINENT DOMAIN, 1, 4. FORFEITURES. HOMICIDE, 1. HUSBAND AND WIFE, 1–3. LOGS AND TIMBER, 6. MECHANICS' LIENS, 1. MUNICIPAL CORPORATIONS, 2, 5, 13. NAVIGABLE WATERS, 1. PAUPERS. PLEADING, 15. PROCESS, 1. PUBLIC LANDS, 3. RAILROADS, 1, 2. STATUTES. STIPULATIONS, 2. TAX TITLES, 3. WILLS, 4.

STAY OF PROCEEDINGS. See TRIAL, 3.

STIPULATIONS.

1. Where money was deposited with the sheriff by a judgment debtor pursuant to a stipulation between the creditor and debtor that it should be applied upon the judgment "in the event of said debtor neglecting and refusing to file" an undertaking on appeal within a certain time, and three days before that time expired a good and sufficient undertaking was served on the attorney for the creditor and was retained by him for his own convenience until after the time fixed for filing had expired, but was filed by the debtor immediately upon its being returned to him, the creditor cannot be heard to say that the debtor *neglected and refused* to file the undertaking pursuant to the stipulation. *Donahue v. Gunter*, 465

2. The money in such case being deposited with the sheriff as a mere stakeholder and not collected by him on execution, sec. 2894c, Stats. (Laws of 1905, ch. 132), has no application. *Ibid.*

3. Where money is paid to and accepted by a sheriff pursuant to a stipulation between the parties to a judgment, he is a party in fact to such stipulation although he does not sign it, and is not justified in applying or paying over the money otherwise than in accordance with the terms of the agreement. *Ibid.*

STOCK AND STOCKHOLDERS. See CORPORATIONS, 1–8. EQUITY, 4–6.

STREET RAILWAYS.

Right of way. See EMINENT DOMAIN, 9–13. INJUNCTION, 3–6.

Injuries to passengers.

1. A person who left a street car and then returned and boarded it again after it had started, for the purpose of getting a shovel which he had negligently left behind, but without informing any one of that purpose, had no right, even if he was still to be considered a passenger, to demand that the car stop before it reached the next stopping place. *Bukowski v. Milwaukee E. R. & L. Co.* 517

2. Negligence of the motorman is not shown by the fact that he increased the speed of the car to about six miles per hour while such a person was standing in a place apparently free from danger, on the front platform or vestibule, holding on to the railing of the door, and reaching into the car for his shovel, although in some way, when the speed of the car was increased, the person fell from the platform and was killed. *Ibid.*

3. Great diligence is required of a motorman in the performance of his duties, but the very nature of his duties prevents him from keeping a close watch in the rear. *Ibid.*

STREETS. See EMINENT DOMAIN, 9–13. MUNICIPAL CORPORATIONS, 12.

SUBCONTRACTORS. See MECHANICS' LIENS, 1. RAILROADS, 2.

SUBROGATION. See PARTITION, 2.

SUBSCRIPTIONS. See CORPORATIONS, 1–3, 5–7.

SUIT MONEY. See DIVORCE, 9, 10.

SUMMONS. See JUDGMENT, 6. PROCESS, 1, 3, 4.

SUPREME COURT. See APPEAL.
SURPLUSAGE. See SALES, 1.
SUSPENSION OF POWER OF ALIENATION. See WILLS, 2–6.
TAXATION. See PUBLIC LANDS, 2, 3, 5, 7. TAX TITLES.

TAX TITLES.

Limitation of actions: Possession after recording of tax deed: Quieting title.

1. In respect to occupied property affected by a tax deed, the statute of limitations acts like a two-edged sword. It cuts both ways, operating in favor of the possessor "to bar the title of whichever party—the original owner, or the tax-title claimant—was, during the three years next after the recording of the tax deed, under the necessity of resorting to legal proceedings to obtain possession." *Laffitte v. Superior*, 73
2. The nature of possession necessary to set the statute of limitations running either way, in respect to a tax deed, is the same as required to constitute adverse possession by a person claiming title founded upon a written instrument. *Ibid.*
3. The rule last above does not require the possession to have all the characteristics mentioned in sec. 4212, Stats. (1898), but there must be that complete dominion over the property, appropriate to ownership of such property similarly situated, by acts sufficiently significant and continuous to reasonably inform the adversary, if he pays reasonable attention to his affairs, that his right is defied. *Ibid.*
4. Merely exercising some rights of ownership by one of two adversaries, the other not being in fact dispossessed so as to render the possession of that one not only hostile and notorious but exclusive, is not sufficient. *Ibid.*
5. Merely surreptitiously obtaining recognition by a tax-deed claimant as landlord, from a tenant of the former owner who continues in possession under such circumstances as to reasonably induce such owner to rely upon the former relations of landlord and tenant continuing, does not work any change of possession so as to turn the statute of limitations from running against the tax deed to running in its favor. *Ibid.*
6. Taking actual possession of a portion of one lot in an inclosed platted block, under a tax deed covering the entire block, leaving another portion of the block in actual possession of the former owner by his tenant, residing thereon, and doing no act as to the balance of the block but surreptitiously obtaining from the tenant recognition as landlord, the former owner appropriating and using the balance of the block, as before—does not change the running of the statute of limitations so as to favor the tax-deed title, except as to that part of the land actually occupied by the invader. *Ibid.*
7. After the status shall have been fixed, as before stated, of actual occupancy of part of the inclosed block by the invader and such occupancy of part by the tenant of the former owner, whether acts of ownership by such owner, occurring as to the balance of the block, are unknown to the tax-title claimant, is immaterial, so long as they are open and notorious. *Ibid.*

8. A tax-deed claimant having induced the former owner's tenant in possession to take from him a lease of the property, the ostensible lessees continuing in possession as before without any apparent change of attitude toward the former owner, evidence of a declaration by the tenant to such owner denying any relations with such claimant recognizing him as landlord, is competent on the question of knowledge of such owner of attornment by such tenant to such claimant. *Ibid.*

9. When the right of a tax-title claimant shall have been extinguished by the statute of limitations, a right is created in favor of the real owner to have the cloud upon the title created by the record of the tax deed, and of any subsequent deed referable thereto, removed and, incidentally thereto, a right exists to an appropriate remedy in that regard, unburdened by any equity in favor of the one whose rights have ceased to exist to refund taxes paid or to compensate for tax liens acquired by him. *Ibid.*

TEMPORARY ALIMONY. See DIVORCE, 9, 10.

TENDER. See CORPORATIONS, 1.

TRESPASS. See PLEADING, 13.

TRIAL.

Course and conduct of trial: Abandonment of cause of action.

1. A plaintiff should be permitted to abandon a separate cause of action stated in his complaint if no one is prejudiced by his doing so. *Ady v. Barnett,* 18

2. If, in an action upon a written order for goods, plaintiff states a separate cause of action based upon alleged oral agreements made at the same time, but abandons it at the trial because satisfied that he could prove it only by incompetent evidence, such conduct gives defendant no right to establish a defense to the cause of action on the written order by evidence of other contemporaneous oral agreements. *Ibid.*

Same: Separate trials. See APPEAL, 2.

Same: Examination of witnesses. See WITNESSES.

Same: Stay of proceedings.

3. Where, upon a motion to stay proceedings until payment of a judgment for costs rendered against the plaintiff in a previous action for the same injuries which had been voluntarily dismissed by him, it appeared that the dismissal resulted from an unexpected situation developed at the trial and was in good faith and that plaintiff has been and is unable to pay the judgment and support his family, the question was one addressed to the sound discretion of the court, and refusal of the stay was not an abuse of such discretion. *Gierczak v. Northwestern Fuel Co.* 207

Reception of evidence. See DEEDS, 3, 4. EVIDENCE, 4. MASTER AND SERVANT, 10. MORTGAGES, 4. MUNICIPAL CORPORATIONS, 9. RELEASE, 9.

4. In an action for personal injuries the admission of testimony of a witness that, shortly after the accident, he asked the plaintiff if he was hurt and that plaintiff complained about his knee and fingers, was not a prejudicial error. *Anderson v. Sparks,* 398

5. In an action for injuries sustained when plaintiff's wagon was run into by an automobile, testimony of a witness that after the accident he and the plaintiff together examined the tracks which they thought were the automobile tracks, was properly admitted where the witness, although he used the pronoun "we," testified to what he knew and saw, and not to any declarations or narrative of the plaintiff. *Ibid.*

Arguments and conduct of counsel. See INSTRUCTIONS TO JURY, 9.

Questions for jury. See AUTOMOBILES, 5, 6. ELECTIONS, 3. MASTER AND SERVANT, 5, 32. RELEASE, 1, 6.

Dismissal or nonsuit. See APPEAL, 6, 19, 21.

Instructions to jury. See APPEAL, 13, 14. ASSAULT AND BATTERY, 3, 4. INSTRUCTIONS TO JURY. MASTER AND SERVANT, 23. MORTGAGES, 3.

Requests for instructions. See CRIMINAL LAW, 3. FRAUD, 7. INSTRUCTIONS TO JURY, 4–7, 17.

General verdict. See APPEAL, 9, 10. CRIMINAL LAW, 4.

Special verdict. See AUTOMOBILES, 6. INSTRUCTIONS TO JURY, 5, 7, 8, 10, 13. MASTER AND SERVANT, 1.

6. Where a question submitted for special verdict, "Was there a defect in the highway at the time and place in question?" was made definite and precise by instructions, so that the jury could not have been misled, it was not prejudicial error to refuse to submit in lieu thereof the question, "Did the hole described in the complaint exist in the highway, at the south side of the culvert, on the 28th day of March, 1904?" *Kortendick v. Waterford,* 413

By the court: Findings of fact and conclusions of law. See APPEAL, 1, 3, 4, 7, 9–11, 16. BILLS AND NOTES. BROKERS. CARRIERS. COSTS, 1. EVIDENCE, 3. HIGHWAYS. MASTER AND SERVANT, 16, 17. SALES, 1.

7. The findings of fact in an action tried by the court should severally cover all of the material issues raised by the pleadings, carefully excluding all other matters, and the paper should be draughted from a strictly judicial viewpoint. *Brenger v. Brenger,* 26

TRUSTS AND TRUSTEES. See JUDGMENT, 7, 8. WILLS, 4, 5.

ULTRA VIRES. See MUNICIPAL CORPORATIONS, 1–3.

UNDERTAKINGS. See APPEAL, 2. STIPULATIONS, 1.

UNITED STATES SENATOR. See ELECTIONS, 9, 10.

USAGE AND CUSTOM. See CONTRACTS, 27, 28. NAVIGABLE WATERS, 4.

VACATING JUDGMENTS. See JUDGMENT, 1–4.

VENDOR AND PURCHASER OF LAND.

Nature of contract. See JUDGMENT, 8, 9.

Vendor's lien. See MORTGAGES, 6, 7.

The right of the vendor of land to a lien thereon for unpaid purchase money is purely an equitable right and will not be enforced to the extent of doing inequity to others,—as where his conduct had induced others to extend credit to the grantee upon the faith of the latter's ownership of the land free from incum-

brance, and the enforcement of the lien would result in loss to such creditors. *Larscheid v. Kittell*, 172

VERDICT. See APPEAL, 9, 10. AUTOMOBILES, 6. CRIMINAL LAW, 4. INSTRUCTIONS TO JURY, 5, 7, 8, 10, 13. MASTER AND SERVANT, 1. TRIAL, 6.

VERIFICATION. See PLEADING, 15.

VESSELS. See NAVIGABLE WATERS, 3, 4.

WAIVER. See EQUITY, 3. MECHANICS' LIENS, 2.

WARNING SERVANT. See MASTER AND SERVANT, 14, 23.

WARRANTY. See SALES, 2, 3.

WATERS AND WATERCOURSES. See NAVIGABLE WATERS.

WELLS. See CONTRACTS, 26, 28.

WILLS.

Probate: Competency of testator.

1. An adjudication in guardianship proceedings that an aged woman was incompetent to manage her own affairs, though not *res judicata* in a proceeding for probate of her will, might properly be considered as persuasive in effect, the evidence being very much the same, and there being no claim that her mental condition had improved before the making of the will. *Deleglise v. Morrissey*, 234

Same: Costs. See COSTS, 2.

Construction: Perpetuities.

2. Where a disposition of real property by will is questioned for remoteness of time of vesting, the inquiry involves, not the number of estates which precedes the time of vesting, but the number of designated persons living at the time of the death of the testator who must die before it can be known in whom the title to the property will vest. *Will of Harrington*, 447
3. The power of alienation is suspended beyond the period permitted by statute by the creation of future estates when the period within which such estates can vest is so remote that the persons in whom they are to vest cannot be ascertained until after the lapse of more than two lives in being at the death of the testator and twenty-one years in addition. *Ibid.*
4. The power of alienation may also be suspended by a devise in trust where the trust term exceeds two lives in being and twenty-one years and alienation prior to that time would be in contravention of the trust and void under sec. 2091, Stats. (1898). *Ibid.*
5. To construe a will not expressly bequeathing personal property in trust as creating a trust with the designated executors as trustees, is proper when this is necessary to carry out the apparent intention of the testator, but not otherwise. *Ibid.*
6. Provisions in a will specifying a fixed time certain to arrive for the distribution of testator's personal property among his surviving children and the children of any deceased child must, as the larger and more significant indication of intention, override mere words and forms of expression not inconsistent therewith but somewhat indicative of a contrary intention. *Ibid.*

Same: Designation of devisees and legatees.

7. Where, after devise of a life estate to two persons, a life estate in remainder is devised to each of testator's four children, and this is followed by a provision that in case of the death of either one of the four children the property willed to either of them is to be equally divided to the remaining living heirs of the testator, subject to the same rule of descent and governed by the same rule as is the property willed directly to the testator's children, there is an apparent intention of the testator that after the death, subsequent to his own, of either of his children without issue the share of such child and the same estate which was provided for such child should pass to the surviving children of testator and to the issue, then living, of any other deceased child. *Will of Harrington,* 447

8. Such a provision shows also an intention that the property so passing to the survivors shall be affected by the same quality of survivorship, so that in case of other deaths of testator's children without issue the whole property would accumulate in the last survivor, except as it had been diminished by vesting in part in the issue of children who died leaving issue. *Ibid.*

9. Alternative legacies and bequests conditioned upon the "death of all my children and any and all children or heirs being their descendants," "the death of all my children and their heirs, meaning any grandchildren that may be born hereafter," and "the death of all my children and their children or heirs," following a fixed time, certain to arrive, for distribution of personal property among testator's children and the child or children of any deceased child of testator, relate to such failure of issue at the time fixed for distribution, and not to an indefinite failure of issue. *Ibid.*

WITNESSES.

Examination: Leading questions.

1. The allowance of leading questions is a matter largely in the discretion of the trial court. Such questions being necessary in this case in order to get at the facts, their allowance was not an abuse of discretion. *Loescher v. State,* 260

Same: Officer of adverse party.

2. Refusal to permit the examination of the former secretary of the plaintiff corporation as an adverse witness did not affect the substantial rights of the defendant in this case, he having been accorded the privilege of a full examination upon everything pertaining to the issues, and the material facts having been presented to the court. *Milwaukee S. & R. Co. v. Lindenberger,* 273

Same: Cross-examination.

3. How far a party may properly be permitted to cross-examine his own witness when there is manifest reason to be surprised by his testimony (especially if the witness be identified in interest with the adverse party) is a matter largely in the discretion of the court, and that discretion will not be reviewed on appeal except in case of abuse. *Gierczak v. Northwestern F. Co.* 207

Credibility. See INSTRUCTIONS TO JURY, 17.

WORDS AND PHRASES.
Accident, in special verdict. See INSTRUCTIONS TO JURY, 8.
Agent, in statute. See PROCESS, 2.
Alimony. See DIVORCE, 6.
Approval, in statute. See STATUTES.
Appurtenant. See EASEMENTS.
Clear evidence. See FRAUD, 5.
Convincing evidence. See FRAUD, 5.
Dangerous machine. See AUTOMOBILES, 1.
Fixture. See FIXTURES, 3.
Furnishing of materials, in statute. See MECHANICS' LIENS, 1.
Indebtedness. See DIVORCE, 11.
Judicial process. See EMINENT DOMAIN, 1.
Laches. See EQUITY, 7.
Neglected and refused, in stipulation. See STIPULATIONS, 1.
Place of the contract. See CONTRACTS, 15.
Retain fees, in statute. See CLERKS OF COURTS, 4.
Satisfactory evidence. See FRAUD, 5.
Special proceeding, in statute. See EMINENT DOMAIN, 3.
Suit in court. See EMINENT DOMAIN, 1, 4.
This question, in instructions to jury. See INSTRUCTIONS TO JURY, 13.
Understood, in deed. See DEEDS, 6.
Void, in statute. See CORPORATIONS, 4.
Wilful. See CRIMINAL LAW, 1.

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